

# The Price of Justice: An Analysis of the Costs that are Appropriately Considered in a Cost-based Vindication of Statutory Rights Defense to an Arbitration Agreement

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## ABSTRACT

*In the wake of AT&T Mobility LLC v. Concepcion, parties opposing enforcement of an arbitration agreement with a class waiver increasingly relied on the prohibitive-costs-based vindication of statutory rights defense. The Supreme Court recently held in American Express Co. v. Italian Colors Restaurant that the effective vindication doctrine cannot be used to invalidate an otherwise enforceable arbitration agreement with class-action waiver simply because the opponents have no “economic incentive” to pursue individual arbitration. However, the Court’s bases for this holding are unclear and unnecessarily call into question the very existence of the “effective vindication doctrine.” This Article examines the historical underpinnings of the prohibitive-costs-based defense and the different frameworks courts have employed to analyze those costs. These approaches can be summarized as (1) the subjective approach, which compares the costs of arbitration to the litigant’s ability to pay; (2) the comparative approach, which compares the costs of arbitration to the costs of proceeding in litigation; (3) the cost/benefit approach, which compares the costs of arbitration to the likelihood of the plaintiff’s potential recovery; and (4) the incentive-based approach, which considers whether the plaintiffs or their potential attorneys have any incentive, given the costs involved, to pursue their claims. This Article concludes that the comparative approach is the only approach that is both grounded in the text of the Court’s vindication of statutory rights jurisprudence and serves the purposes of the FAA and enforcing statutory rights.*

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I. INTRODUCTION

Recent Supreme Court jurisprudence has given an effective “thumbs up” to arbitration. The Court has held that states may not treat arbitration clauses with disfavor simply because they involve low-value consumer claims;<sup>1</sup> that states may not invalidate pre-

1. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) (holding that the

dispute arbitration agreements that include personal injury claims on the basis of public policy;<sup>2</sup> and that federal statutes that prevent waiver of their substantive rights do not imply a guarantee of a judicial forum unless that forum is specifically required by statute.<sup>3</sup> Most recently, the Court held that an arbitration agreement with class waiver was enforceable in *American Express Co. v. Italian Colors Restaurant*, even though the opponents to the agreement argued that without a class mechanism, they had no economic incentive to pursue their federal antitrust claims.<sup>4</sup>

The clear directive by the Court is that under the Federal Arbitration Act (“FAA”),<sup>5</sup> arbitration is a perfectly acceptable alternative to litigation. Some commentators have argued that this thwarts access to the courts envisioned by eighteenth-century norms;<sup>6</sup> others have urged Congress to limit the FAA and explicitly preclude the use of the class waiver.<sup>7</sup> Further, courts were split as to the implication of the Court’s recent arbitration cases.<sup>8</sup> While it is

Federal Arbitration Act preempts California’s state law rule that “interferes” with arbitration, by requiring it *ex post*).

2. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (“West Virginia’s prohibition against pre-dispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”).

3. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672–73 (2012) (holding that the Credit Repair Organizations Act’s grant of a “right to sue” coupled with a provision that rendered void any substantive right provided by Act did not render claims arising under the Act inarbitrable).

4. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) The question presented was “[w]hether the Federal Arbitration Act permits courts, invoking the federal substantive law of arbitrability, to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.” Petition for Writ of Certiorari, *Am. Express*, 133 S. Ct. at 594 (No. 12-133), 2012 WL 3091064 at \* i (internal quotation marks omitted).

5. 9 U.S.C. § 1 *et seq.* (2000).

6. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 HARV. L. REV. 78, 168–70 (2011).

7. Ann Marie Tracey & Shelley McGill, *Seeking A Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 LOY. L.A. L. REV. 435, 473 (2012) (arguing that “Congress should invalidate waivers of collective consumer action along with pre-dispute arbitration agreements”).

8. See, e.g., *In re Am. Express Merch. Litig.*, 667 F.3d 204, 207 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012), and *overruled by American Express*, 133 S. Ct. 2304, 2310 (2013) [hereinafter *Amex III*]; *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159–1161 n.3 (9th Cir. 2012) (distinguishing *Amex III*, but then, in an enigmatic footnote, stating that “to the extent that the Second Circuit’s opinion is not distinguishable, we disagree with it and agree instead with the Eleventh Circuit”). As *Coneff* recognizes, the federal appellate courts are split as to whether, post-*Concepcion*, an arbitration agreement can be held unenforceable because, in light of the costs

now settled that California's *Discover Bank* rule (rendering unenforceable arbitration agreements with class-action waivers that "predictably involve small amounts") is preempted as a state law unconscionability defense of wide applicability,<sup>9</sup> the Second Circuit held that an arbitration agreement is not enforceable when it deprives prospective litigants of the opportunity to vindicate federal statutory rights due to a class waiver.<sup>10</sup> This breathed new life into the vindication of statutory rights defense that is sometimes used to avoid otherwise enforceable arbitration agreements.<sup>11</sup> Indeed, critics of the enforceability of arbitration agreements in the context of "low value" claims turned to the vindication of statutory rights defense as the last major defense following the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.<sup>12</sup>

The questions arising from the use of this judicially created defense and from the Court's decision in *American Express* abound: (1) Is the vindication of statutory rights defense based on mere *dicta*, or should it survive the Court's recent pro-arbitration

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of individual claims, there is no *incentive* for individual claimants to pursue statutory rights. *Coneff*, 673 F.3d at n.3. Curiously, the Ninth Circuit in *Coneff* aligned itself with the Eleventh Circuit's decision in *Cruz v. Cingular Wireless*. 648 F.3d 1205, 1215 (11th Cir. 2011). But the Eleventh Circuit specifically declined to address whether an arbitration agreement could be invalidated on public policy grounds when the effect is to foreclose low-value claims because the Supreme Court had already held that the same arbitration agreement at issue in *Cruz* was sufficient to make the plaintiffs "whole" in *Concepcion*. *Id.*

9. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1750 (2011) (quoting *Discover Bank v. Superior Court*, 113 P.3d 1110 (Cal. 2005)).

10. *Amex III*, 667 F.3d at 217–19 (holding that "[t]he evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws").

11. *In re Am. Express Merch. Litig.*, 681 F.3d 139 (2d Cir. 2012) (denying petition for rehearing en banc in *Amex III*) (Jacobs, J., dissenting) (claiming that en banc review is needed because "[A] the panel opinion is unbounded and can be employed to defeat class-action waivers altogether; [B] it makes the district court the initial theater of arbitral conflict on the merits (how else does a district court estimate the cost of a litigation?); and [C] it is already working mischief in the district courts"). Five judges would have granted the petition for rehearing en banc in *Amex III*. *Id.*

12. *See, e.g.*, Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 826 (2012) (arguing that the defense can even be applied to state law rights); *see also* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 647–52 (2012) (arguing that the "effective vindication" doctrine, "properly framed" is available under state law when the class waiver operates to exculpate or confer de facto immunity on the defendant, and implicates state common law policy against exculpatory contracts).

jurisprudence?;<sup>13</sup> (2) If the vindication of statutory rights defense is viable, and I believe it is, does it only apply to enforcement of federal statutory rights?; and (3) In a defense based on prohibitive costs to arbitration, what is the proper framework for analyzing those costs?

As the use of binding arbitration agreements has increased in popularity in all contexts—commercial, employment, consumer products, and even health care—the question of when and how such agreements should be enforced has received much debate.<sup>14</sup> This is exacerbated by the increased presence of the class-action and arbitration waiver found in many arbitration agreements.<sup>15</sup> As the Court recently noted, arbitration is ill-suited for adjudicating matters based on class representation—thus, it seems that arbitration will proceed individually, unless otherwise agreed to by the parties, or not at all.<sup>16</sup>

Critics of arbitration reacted to the class waiver in arbitration agreements by arguing that such waivers should not be enforced under two rubrics: state law unconscionability defenses and on the basis that they deprive litigants of vindicating statutory rights

13. The Court's decision in *American Express* calls the continued viability of this doctrine into question. Justice Scalia writes that the "effective vindication" exception to arbitration originated as "dictum" in *Mitsubishi Motors*. *American Express*, 133 S. Ct. at 2310. Scalia also opines that "the Court in *Mitsubishi Motors* did not hold that federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate his rights in the arbitral forum." *Id.* at n.2 (emphasis added). But many people, myself and Justice Kagan writing for the dissent included, would argue that *Mitsubishi* squarely held just that: "An arbitration clause will be enforced only 'so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.'" *Id.* at 2314 (Kagan, J., dissenting) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

14. See, e.g., Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 478–82 (2009) (analyzing the evolution and use of arbitration agreements in consumer products and services). For a history of the adoption of the consumer product arbitration agreement, see Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 398 (2008) ("The practical consequences of the new legal era were significant. Arbitration left the province of particular business guilds or commercial environments and shifted to a massive privatization of the adjudicatory function. . . . [A] genre of new arbitration arose, in which arbitration agreements were essentially imposed upon a large, general class of consumers and workers."), and Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 394–98 (2005). As evidenced by *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012), the use of pre-dispute arbitration agreements is being adopted even in the health care industry.

15. See Lampley, *supra* note 14 at 503–17 (discussing the evolution of class-action waivers in arbitration agreements).

16. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (explaining that "[a]rbitration is poorly suited to the higher stakes of class litigation").

because individual costs will be prohibitive.<sup>17</sup> But in *Concepcion*, the Court held that a state law that operated to continuously render class arbitration waivers unconscionable was preempted by the FAA.<sup>18</sup> While *Concepcion* certainly does not eradicate unconscionability as a viable defense,<sup>19</sup> it does mean that class waivers are not *per se* unconscionable, particularly when coupled with the “arbitration-friendly” procedures present in AT&T’s arbitration clause (such as manufacturer-pays-all arbitration costs, the availability of double attorney’s fees, and a windfall to the prevailing plaintiff who recovers more than AT&T’s last settlement offer).<sup>20</sup> After *Concepcion*, courts continue to struggle with prohibitive-costs-based defenses under the theory that prohibitive costs prevent vindication of statutory rights. But courts have no consensus on what factors should be analyzed under a “prohibitive costs” defense and to what such costs should be compared as a benchmark for determining whether they are truly prohibitive.<sup>21</sup>

The Supreme Court’s decision in *American Express* has resolved a piece of the puzzle: an arbitration agreement with a class waiver will not be unenforceable under a “prohibitive costs” defense simply because without the class mechanism, the plaintiffs have no economic incentive to pursue their claims.<sup>22</sup> The lower courts are now left to determine what is the measure of a litigant being deprived of his or her opportunity to vindicate statutory rights. Is it solely a matter of comparative costs? To what extent should attorneys’ fees be considered in the cost calculation?<sup>23</sup> To what

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17. See Lampley, *supra* note 14 at 490–99 (analyzing the historical defenses to arbitration).

18. *Concepcion*, 131 S. Ct. at 1753.

19. *Id.* at 1748. As the Court noted, Section 2’s “saving[s] clause preserves generally applicable contract defenses,” but nothing in it “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.*

20. See *id.* at 1753 (describing the terms of AT&T’s “consumer friendly” agreement and citing the district court’s conclusion that the plaintiffs were “better off” in arbitration than as members of a class) (emphasis added).

21. See *infra* Part IV.

22. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (“But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”).

23. See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 768–70 (2006) (arguing that contingency fee agreements should be equally available to advance arbitration costs as they are to front litigation costs). The availability of contingency fee agreements with advanced costs, or lack thereof, has been a factor some courts have

extent do “incentivizing clauses” play a part? And does the litigant’s inability to hire a lawyer or expert for the potential sums recoverable individually mean that a court should find an agreement between two entities unenforceable? To what extent does the lack of incentives to bring a claim weigh in favor of not bringing the claim at all? This Article looks to the history of the cost-based defense and proposes to offer some answers to these questions.

Part II of this Article outlines the history of the Federal Arbitration Act and the genesis of the “vindication of statutory rights” defense to arbitration based on prohibitive costs. Part III analyzes the courts’ different approaches to cost-based defenses and how those approaches have changed in light of the class arbitration waiver. Part IV argues that courts have traditionally employed either one or a hybrid of four different frameworks to assess prohibitive costs to arbitration. These approaches can be summarized as: (1) the subjective approach, which compares the costs of arbitration to the litigant’s ability to pay; (2) the comparative approach, which compares the costs of arbitration to proceeding in litigation; (3) the cost-benefit approach, which compares the costs of arbitration to the likelihood of the plaintiff’s potential recovery; and (4) the incentive-based approach, which considers whether the plaintiffs or their potential attorneys have *any incentive* to pursue their claims, given the costs involved.<sup>24</sup> Part V discusses the effect of *American Express* on the cost-based defense. Part VI then analyzes the textual sources for any given approach and ultimately concludes that the comparative approach, which compares the costs of arbitration to proceeding in litigation, is the only approach that is both grounded in the text of the Court’s vindication of statutory rights jurisprudence and serves the purposes of the FAA and enforcing statutory rights. Thus, any comparison based on lack of incentives (a policy based argument), a claimant’s ability to pay, or the likely costs of recovery, will yield decisions that are overly protective of the judicial forum. An otherwise binding arbitration agreement should only be invalidated on the basis that costs prevent a litigant from vindicating statutory rights when the litigant shows that the costs of proceeding in arbitration, as compared to litigation costs, are truly excessive.

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considered in considering the prohibitive costs of arbitration. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 664 (6th Cir. 2003) (en banc) (noting that due to the contingency fee arrangement, many litigants would face “minimal” costs in the judicial forum, while the litigant may have to pay the fees of the arbitrator in the arbitral forum).

24. See *infra* Part VI and notes 219–22.

## II. THE FAA AND GENESIS OF THE VINDICATION OF STATUTORY RIGHTS DEFENSE

The FAA declares that all “contract[s] evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>25</sup> As courts have echoed since its enactment in 1925, the FAA was passed “in response to widespread judicial hostility to arbitration agreements.”<sup>26</sup> Thus, it reflects Congress’s “liberal federal policy favoring arbitration.”<sup>27</sup> It requires that courts place “arbitration agreements on equal footing with all other contracts”<sup>28</sup> and “enforce them according to their terms.”<sup>29</sup>

Despite this backdrop, a quarter of a century after the FAA’s enactment, courts treated arbitration of federal claims with serious disdain. In the Supreme Court’s 1953 *Wilko v. Swan* decision, the Court refused to compel arbitration of a Securities Act claim on the basis that prospective waiver of the judicial forum was prohibited by Section 14 of the Securities Act, which rendered any waiver of compliance with its provisions void.<sup>30</sup> The Securities Act had a

25. 9 U.S.C. § 2 (2000).

26. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *see also* *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

27. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24 (1983) (emphasis added); *Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quoting *Moses H. Cone*, 460 U.S. at 24); *see also, e.g.*, *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (“[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.” (quoting *Volt*, 489 U.S. at 476)).

28. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Concepcion*, 131 S. Ct. 1740, 1745 (2011).

29. *Concepcion*, 131 S. Ct. at 1745. *See Volt*, 489 U.S. at 475.

30. *Wilko v. Swan*, 346 U.S. 427, 434–45 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477 (1989). The Court reasoned that “the right to select the judicial forum is the kind of ‘provision’ that cannot be waived under §14 of the Securities Act.” *Id.* at 435. The petitioner’s claim in *Wilko* sounds much like the present-appellees’ claim protesting the arbitral forum in *Amex III*. For example, the petitioner argued that Congress intended “to assure that sellers (of Securities) could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act. He contends that arbitration lacks the certainty of a suit at law under the Act to enforce his rights.” *Id.* at 432. *Cf.* Brief for Respondents at 54, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (No. 12-133), 2013 WL 267025, at \*54 (arguing that requiring the individual merchants to proceed in individual arbitration despite high expert costs “would be particularly troubling in the antitrust



unique provision granting the purchaser (to-be petitioner) with choice of venue, nation-wide service, and the waiver of any jurisdictional threshold requirement for diversity cases.<sup>31</sup> In an exercise of judicial activism, the Court reasoned that the protections of the Securities Act “require . . . *judicial direction* to fairly assure their effectiveness”; thus, the right to judicial review, while not explicitly provided in the Act, could not be waived.<sup>32</sup>

*Wilko* set the stage for sweeping court decisions, striking down any prospective arbitration agreement that the courts viewed as involving a claim “inappropriate” for arbitration.<sup>33</sup> The circuit courts held unenforceable pre-dispute arbitration agreements involving a host of federal statutory provisions, including claimed violations of the Sherman Act, the Patent Act, the Railway Labor Act, the Employment Retirement Income Security Act, and employment claims under Title VII because the courts viewed the arbitral forum as unsuitable to hear such claims.<sup>34</sup>

### *A. The Origin of the Vindication of Statutory Rights Doctrine*

A monumental sea change came with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>35</sup> a case concerning whether a pre-dispute arbitration agreement between two commercial entities

context, where private enforcement serves important public functions”). *See also* Brief and Special Appendix for Plaintiffs-Appellants, *In re Am. Express Merchs. Litig.* at 17, 554 F.3d 300 (2d Cir. 2009) (No. 06-1871-cv), 2006 WL 6198567 (“The American Express Card Acceptance Agreement for small merchants, with its collective action ban, flatly ensures that no small merchant may challenge American Express’s tying arrangements under the federal antitrust laws.”).

31. *Wilko*, 346 U.S. at 431.

32. *Id.* at 437 (emphasis added).

33. David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 730–31 (2012) (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968)).

34. *See id.* at 734–35 and accompanying notes (describing the history and breadth of the non-arbitrability doctrine and noting illustrative cases); *see also Am. Safety*, 391 F.2d at 825, *overruled by Rodriguez*, 490 U.S. 477 (1989) (holding that Sherman Act claims were inappropriate for arbitration); *Hanes Corp. v. Millard*, 531 F.2d 585, 593 (D.C. Cir. 1976), *superceded in part by statute*, 35 U.S.C. § 294 (2006), and *overruled in part by Shearson/American Express, Inc. v. McMahan*, 482 U.S. 220 (1987) (Patent Act claims inappropriate for arbitration); *Air Line Pilots Ass’n, Int’l v. Nw. Airlines, Inc.*, 627 F.2d 272, 277 (D.C. Cir. 1980) (Railway Labor Act claims not appropriate for arbitration); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 939 (3d Cir. 1985), *overruled by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) (ERISA claims inappropriate for arbitration); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974) (Title VII).

35. 473 U.S. 614 (1985).

could be enforced as to a federal antitrust claim brought by a domestic corporation against an international corporation.<sup>36</sup> Despite prior precedent holding that antitrust claims were “inappropriate for enforcement by arbitration,”<sup>37</sup> the district court held that the international character of the agreement (including arbitration) required enforcement even as to antitrust claims.<sup>38</sup> The First Circuit reversed pursuant to the non-arbitrability doctrine, and the Supreme Court granted certiorari “primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.”<sup>39</sup> Notwithstanding its purported limitation to international arbitration agreements, the *Mitsubishi* decision would eventually set the stage for enforcement of pre-dispute arbitration of federal claims.

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36. *Mitsubishi Motors Corporation*, a Japanese automobile manufacturer, entered into an agreement with Soler Chrysler-Plymouth that provided for the direct sales to Soler of Mitsubishi products and allowed Soler, a Chrysler dealer, to sell and market these Mitsubishi products in Puerto Rico. *Id.* at 617. The sales agreement also provided for mandatory arbitration of all disputes arising out of the agreement. *Id.* The arbitration was required to proceed in Japan pursuant to the rules of the Japan Commercial Arbitration Association. *Id.* Mitsubishi filed suit against Soler in the United States District Court for the District of Puerto Rico seeking to compel Soler to arbitrate its breach-of-contract claims pursuant to the Sales Agreement and the FAA. *Id.* Soler denied the allegations in Mitsubishi’s complaint, and counterclaimed against both Mitsubishi and its co-defendant, alleging various breach of contract claims by Mitsubishi, defamation claims, and statutory claims, including a cause of action under the Sherman Act, 15 U.S.C. § 1 *et seq.* *Id.* at 620.

37. *Id.* at 621 (internal quotation marks omitted). The United States Court of Appeals for the Second Circuit had held that rights conferred under federal antitrust laws were “of a character inappropriate for enforcement by arbitration” in *American Safety Equipment Corporation v. J.P. Maguire & Co.*, 391 F.2d at 827. The other circuits uniformly adopted this holding. *See, e.g.*, *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978) (refusing to enforce arbitration agreement when antitrust issues permeate the case); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974) (recognizing exception for post-dispute arbitration agreements); *Helfenbein v. Int’l Indust. Inc.*, 438 F.2d 1068, 1070 (8th Cir. 1971); *A & E Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 715–16 (9th Cir. 1968). Each of these cases prohibiting the arbitration of domestic antitrust claims was impliedly overturned by *Mitsubishi* and *Rodriguez v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (reversing *Wilko v. Swan*, 346 U.S. 427 (1953), and holding that pre-dispute arbitration agreements covering claims arising under §14 of the Securities Act, 15 U.S.C. § 77, are enforceable because “*Wilko* is pervaded by . . . ‘the old judicial hostility to arbitration.’” (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942))).

38. *Mitsubishi*, 473 U.S. at 621. The district court ordered the arbitration in reliance on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515–20 (1974), in which the Supreme Court ordered arbitration of a claim under the Securities Exchange Act of 1932 notwithstanding *Wilko*, due to the context of the international agreement.

39. *Mitsubishi*, 473 U.S. at 624.

Before reaching the issue of the arbitrability of antitrust claims in the international context, the *Mitsubishi* Court addressed Defendant Soler's contention that a court may not construe an arbitration agreement to reach statutory claims unless the party that the statute was designed to protect expressly agreed to arbitrate those statutory claims. Turning to the language of the FAA, the Court rejected this argument, finding "no warrant in the [FAA] for implying in every contract . . . a presumption against arbitration of statutory claims."<sup>40</sup> The Court reasoned that, "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."<sup>41</sup> Ironically, nearly thirty years ago, the *Mitsubishi* Court expressed the aspirational sentiment that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>42</sup> Although the Court did not foreclose the idea that statutory claims may ever be excluded from the realm of arbitration, it did hold, in contravention of the non-arbitrability doctrine, that to exclude the statutory claim from the ambit of the FAA, Congressional intent must be evident.<sup>43</sup>

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40. *Id.* at 625. Of course, the Court acknowledged that agreements to arbitrate may be revoked on the same grounds as those that would require the revocation of any contract, i.e. fraud, overwhelming economic power, etc., but it stated that "absent such compelling considerations, the [FAA] provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Id.* at 627.

41. *Id.* at 626.

42. *Id.* 626–27. As the recent flurry of anti-arbitration litigation in the wake of the class waiver has shown, even thirty years past *Mitsubishi* and eighty years past the enactment of the FAA, we are not "well past the time" when suspicion of the desirability and competence of arbitration inhibits its use. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011); *In re Am. Exp. Merchs.' Litig. (Amex III)*, 667 F.3d 204, 207 (2d Cir. 2012) (*cert granted*, 133 S. Ct. 594 (2012)) and *rev'd sub nom.* *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)); *Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947, 960 (9th Cir. 2012), (recognizing, in *dicta*, that "[i]t may be that enforcing arbitration agreements even when the plaintiff is requesting public injunctive relief will reduce the effectiveness of state laws like the UCL"). *Amex III* is a paradigm example. In this arbitration agreement between two businesses to prospectively arbitrate any disputes, the plaintiffs/small business owners claimed that to enforce the arbitration agreement would deprive them of vindicating their antitrust claims. This argument sounds a lot like those heard before and rejected in *Mitsubishi*.

43. *Mitsubishi*, 473 U.S. at 627. The Court left itself some "wiggle" room. Couching its holding with the moderate disclaimer that it "is not to say that *all* controversies implicating statutory rights are suitable for arbitration." *Id.* (emphasis added). This marks the beginning of the Court's discomfort with a blanket proclamation that all statutory claims may be arbitrated, but reluctance to abrogate freedom of contract by delineating just what would make a statutory

The Court's reasoning for the express-exclusion requirement provides the basis for modern-day "vindication of statutory rights" attacks on arbitration clauses: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>44</sup> Because the protected party's substantive rights under the statute are preserved and capable of vindication in the arbitral forum, the party has only "trad[ed] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."<sup>45</sup>

Turning to the arbitrability of antitrust issues between a domestic party and an international party, the Court held that rules of international comity, the Arbitration Convention, and the presumption in favor of enforcing freely negotiated contractual choice of forum provisions outweighed judicial protectionism of antitrust claims cases.<sup>46</sup> The Court reiterated that a party resisting arbitration may directly attack the arbitration clause if "enforcement would be unreasonable and unjust; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court."<sup>47</sup> However, the Court left the legitimacy of the non-arbitrability doctrine as applied in *American Safety* between domestic corporations intact.<sup>48</sup>

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claim unsuitable for arbitration. Of course, parties to the agreement could always draft an arbitration agreement excluding all or some statutory claims, such as antitrust claims.

44. *Id.* at 628. The Supreme Court characterized this portion of *Mitsubishi's* holding as *dicta* in *American Express*. See *infra* note 208 and accompanying text. However, as discussed above, the effective vindication doctrine was a critical piece of the *Mitsubishi* Court's holding that arbitration provided an equally suitable alternative forum.

45. *Id.*

46. *Id.*

47. *Id.* at 632 (internal quotation marks omitted) (alteration in original).

48. *Id.* at 629. Regarding *American Safety* and the four ideals embraced by the First Circuit with skepticism, the Court found the second concern—the possibility that contracts which generate antitrust issues may be contracts of adhesion—unjustified. *Id.* at 632. With respect to the judicial retention rationale based on the complexity of the law and evidence, the Court adhered to the view that "adaptability and access to expertise are hallmarks of arbitration," and the parties are free to take into account the complexity of the issue when appointing the arbitrators. *Id.* at 633. In addition, the Court noted, at the time of the contract the parties mutually preferred a procedure that would produce streamlined proceedings and expeditious results—a preference that would be well-served by reduced complexity. The Court also recognized that most lower courts following the *American Safety* doctrine were quite willing to enforce post-dispute agreements to arbitrate antitrust issues regardless of levels of complexity. *Id.* at 633–34.

The Court also rejected the proposition that an arbitration proceeding would pose innate hostility to the free-market ideal of competition: “We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.”<sup>49</sup> Finally, the Court rejected the public policy suggestion that the importance of the private litigant to enforcement of antitrust laws (as opposed to the government alone) could justify removal of antitrust claims from the arbitral sphere. Although the clear import of the Sherman Act’s treble damages provision is to enable an injured competitor to gain remedial damages,<sup>50</sup> the cause of action remains at all times under the control of the individual. No citizen is required to bring an antitrust suit; and no citizen is prohibited from settling an antitrust suit for less than full value.<sup>51</sup> Thus, a prospective litigant may provide in advance for a mutually agreeable procedure to settle his controversies, including his antitrust claims. The cornerstone of the Court’s theory was based on this premise: “[S]o long as the *prospective* litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>52</sup> Thus, in a case intended to cast arbitration, even of

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49. *Id.* at 634.

50. The Court recounted the legislative history of § 4 of the Clayton Act which, when reenacted in 1914, “was still conceived primarily as open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.” *Id.* at 636 (quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb)) (internal quotation marks omitted) (alterations in original).

51. These two observations by the Court in 1985 still ring true today. In *American Express*, the Department of Justice filed an amicus brief urging the Court to affirm the Second Circuit’s decision holding that the arbitration agreement prohibited vindication of statutory rights. As a basis for its interest in this matter, the Solicitor General stated:

Private actions are an important supplement to the government’s civil enforcement efforts under federal competition laws, which the Department of Justice and the Federal Trade Commission have primary responsibility for administering . . . . The United States therefore has a substantial interest in ensuring that arbitration agreements are not used to prevent private parties from obtaining redress for violations of their federal statutory rights.

Brief for the United States as Amicus Curiae Supporting Respondents, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), 2013 WL 367051 at \*1–2. But despite the importance of private enforcement, no litigant is required to bring an antitrust claim, no matter how meritorious, and there is no requirement that any litigant see a claim through to final adjudication.

52. *Mitsubishi*, 473 U.S. at 637 (emphasis added). The Court’s focus on the *prospective* litigant in this language should not be overlooked. So long as the parties, at the time of drafting

remedial statutes, on equal or more favorable footing as the judicial forum, the Court crafted language that would soon give rise to a method for invalidating arbitration agreements.

*B. Post-Mitsubishi: The Increasing Arbitrability of Federal Claims*

*Mitsubishi* laid the foundation for the Court's sheltering of arbitration agreements. In the years after *Mitsubishi*, the Court held enforceable arbitration agreements as to claims based on various protective statutes such as § 10(b) of the Securities Exchange Act of 1934,<sup>53</sup> the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>54</sup> § 12(2) of the Securities Act of 1933,<sup>55</sup> and the Age Discrimination in Employment Act (ADEA).<sup>56</sup> Each time, the Court finessed the contours of the burgeoning vindication of statutory rights doctrine. In *Shearson/American Express, Inc. v. McMahon*, the Court held that "[a]bsent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract[.],' the Arbitration Act 'provides no basis for disfavoring agreements to arbitration statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'"<sup>57</sup> Similarly, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court construed the FAA to permit courts to "give relief" from arbitration agreements "where the party opposing the arbitration presents 'well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.'"<sup>58</sup>

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the arbitration agreement, are not foreclosed of the opportunity to vindicate statutory rights by choosing the arbitral forum, the arbitration agreement should be upheld regardless of the parties' changed circumstances in post-contractual litigation. Like an unconscionability analysis, the Court's focus under a vindication of statutory rights analysis should be guided by the *ex ante* position of the parties.

53. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

54. *Id.*

55. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989).

56. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28–29 (1991).

57. *McMahon*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 627). Note the Court's emphasis on a disparity of bargaining power here—i.e., a claim that sounds like a state law defense of unconscionability or even duress. This is a departure from the Court's language in *Mitsubishi* that focused on whether the prospective litigant could vindicate statutory rights.

58. *Rodriguez de Quijas*, 490 U.S. at 483–84. *But see id.* at 481 ("The shift in the Court's views on arbitration away from those adopted in *Wilko* is shown by the flat statement in

The next progression in the evolution of the “vindication of statutory rights” defense came in *Gilmer v. Interstate/Johnson Lane*,<sup>59</sup> in which the Court enforced a pre-dispute arbitration agreement in an employment contract. The *Gilmer* plaintiff contended that claims arising under the ADEA were inappropriate for arbitration because the ADEA was designed to address important social policies in addition to individual grievances.<sup>60</sup> After recognizing *Mitsubishi*’s holding that the arbitral forum is an equal, if not better, forum furthering broad social purposes, the Court reiterated: “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>61</sup> Perhaps in reaction to its *dicta* from earlier cases noted above, the Court admonished that “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>62</sup>

Closely akin to the plaintiffs in *Amex III*, *Gilmer* argued that the arbitration procedures, which did not provide for class actions or broad equitable relief, could not adequately further the purposes of the ADEA.<sup>63</sup> The Court disagreed that this procedural inconsistency rendered arbitration inconsistent with the ADEA, noting that arbitrators do have the power to fashion equitable relief and that the arbitration rules at issue also provided for collective proceedings.<sup>64</sup> Further, the Court recognized the possibility that the EEOC could still bring an administrative action seeking class-wide or equitable

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*Mitsubishi*: ‘By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’”).

59. 500 U.S. at 28.

60. *Id.* at 27.

61. *Id.* (alterations in original) (citing *Mitsubishi*, 473 U.S. at 637). In contrast to *Mitsubishi*, which involved an agreement between two commercial organizations, *Gilmer* involved an agreement between an employee and employer. The Court found the distinction irrelevant. *Id.* at 33. The Court reminded “courts [to] remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract,” but found no such proof in this case. *Id.* (internal quotation marks omitted).

62. *Id.* For example, the Court noted: “Relationships between securities dealers and investors . . . may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that agreements to arbitrate in that context are enforceable.” *Id.*

63. *Id.* at 32.

64. *Id.*

relief.<sup>65</sup> “But,” the Court noted, “even if the arbitration could not go forward as a class action, or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean individual attempts at conciliation were intended to be barred.”<sup>66</sup> Thus, the Court implicitly recognized that an employee still maintains the ability to effectively vindicate his or her statutory rights under the ADEA in the arbitral forum even if that forum results in the waiver of the opportunity to bring a class action.

*C. Use of “Vindication of Statutory Rights” as a Defense*

The prospective litigant’s ability to “effectively vindicate” statutory rights in both *Mitsubishi* and *Gilmer* was central to the Court’s holding that those pre-dispute arbitration agreements must be enforced. Although the Court raised the specter of unequal bargaining power as a potential defense in cases following *Mitsubishi*, that theory was effectively foreclosed in *Gilmer*’s recognition that unequal bargaining power alone was not enough to invalidate an enforceable arbitration agreement. Then in *Green Tree Financial Corp.-Alabama v. Randolph*<sup>67</sup> the plaintiff argued that the “vindication of statutory rights” doctrine should be used as a defense to an arbitration agreement. *Randolph* presented the quintessential case of bargaining-power disparity. The plaintiff, a consumer-purchaser of a mobile home, financed the transaction through a financial services company.<sup>68</sup> The merits of the plaintiff’s claim alleged that the defendant failed to disclose a finance charge in violation of the Truth in Lending Act (TILA).<sup>69</sup>

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65. *Id.* at 33.

66. *Id.* at 32 (alteration in original). Any concerns about relinquishing class relief through binding arbitration were lessened by the Court’s recognition that arbitration agreements do not preclude the EEOC from bringing actions seeking class-wide and equitable relief. *Id.* As corporate use of the class waiver increases, we should see agencies such as the EEOC and state attorney generals increase public enforcement in the void left by class actions. See Myriam Gilles & Gary Friedman, *supra* note 12 at 660–65 (arguing that state attorney generals, through *parens patriae* authority, should “fill the void left by class actions”); see also Lampley, *supra* note 14 at 517 (arguing that the deterrent effect typically served by class actions could be filled by state attorney generals or agency enforcement if class actions are diminished by the class waiver).

67. 531 U.S. 79 (2000). Plaintiff Randolph filed class claims under the TILA and Equal Credit Opportunity Acts, and Defendant Green Tree moved to compel arbitration pursuant to a binding arbitration agreement. *Id.* at 83.

68. *Id.* at 82.

69. *Id.*



The *Randolph* plaintiff argued that the arbitration agreement should be unenforceable because the agreement's silence as to who would bear the costs of arbitration posed such a risk that she would be unable to enforce her statutory rights under the Truth in Lending Act.<sup>70</sup> In a sentence that would reverberate thousands of times throughout the lower courts dealing with enforcement of arbitration clauses, the Court acknowledged: "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."<sup>71</sup> But the plaintiff had not shown that she would bear such costs if the matter proceeded to arbitration.<sup>72</sup> The Court held that Randolph's "risk" of being "saddled with prohibitive costs [was] too speculative to justify the invalidation of an arbitration agreement."<sup>73</sup>

*Randolph* did two things that are critical to understanding the current state of a cost-based defense to arbitration: (1) it recognized the potential for invalidation of an arbitration agreement based on prohibitive costs, and (2) it placed that burden on the party seeking invalidation. But the Court refused to address the next logical question: what kind of showing of prohibitive expense must be met to justify a decision that arbitration is prohibitively expensive?<sup>74</sup> The sub-inquiries are numerous. What kinds of costs are properly considered as arbitration costs? Do they include costs that would be inherently bound up in litigation, such as expert fees or costs of discovery? How should the burden of proof be met, by affidavit or preliminary hearing? And how much discovery and briefing should be permitted on this issue? This final question poses a danger of swallowing the entire proceeding in extensive discovery in what should be a relatively simple exercise to enforce, or not enforce, an arbitration agreement. The result we see in *American Express*, in which the parties have been tied up in Court nine years simply on the arbitration issue, is not in accord with the intent of the FAA or

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70. Neither party disputed the arbitration clause's applicability to all claims, even statutory claims, arising under the contract, and Ms. Randolph did not contend that the TILA evinces a clear intention by Congress to preclude waiver of judicial (or class) remedies. *Id.* at 90.

71. *Id.*

72. *Id.*

73. *Id.* at 91.

74. *Id.* at 92 ("How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.").

the intended implications of *Randolph*. By leaving this question open, the Court caused parties to arbitration agreements to have uneven application and uncertainty in the law.

But there are some buried guideposts in the footnoted *dicta* of *Randolph*. In rather lengthy footnote six, the Court recounts the record evidence on which the plaintiff relied to show prohibitive costs. In her motion to reconsider before the trial court, the plaintiff acknowledged that the arbitration agreement was silent as to selection of arbitral forum or arbitrator.<sup>75</sup> Thus, the plaintiff “assumed” the filing would be with the American Arbitration Association (AAA).<sup>76</sup> The plaintiff also assumed the filing fee for claims under \$10,000 was \$500, which did not include the costs of the arbitrator or administration fees.<sup>77</sup> The plaintiff also cited an article published by the Bureau of National Affairs, entitled *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, in which an AAA executive noted that the average arbitral fee is \$700 per day.<sup>78</sup> The Court gave these assumptions no credence, as the plaintiff had made no showing that her arbitration would proceed in the AAA, or that if it did, that she would actually incur those charges referenced.<sup>79</sup> The Court declined to address the plaintiff’s contention that the arbitration agreement was unenforceable because it prevented her from bringing her TILA claims as a class action.<sup>80</sup> The arbitration agreement was silent as to the availability of class claims.

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75. Of course, it is curious that the negative implication of this drafting error resulted in construal against the plaintiff, who had no arm’s length negotiation as to its terms.

76. *Id.* at 90 n.6.

77. *Id.* But the plaintiff submitted no *proof* of these fees. Although she attached “informational material from the American Arbitration Association (AAA),” it did not discuss fees. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at n.7. The Court also did not address the underlying question of whether the vindication of statutory rights issue is a question of arbitrability reserved for a court to determine or whether it is a matter for the arbitrator to decide. On the one hand, if the existence of prohibitive arbitration costs did actually deprive a plaintiff of her opportunity to effectively vindicate statutory rights, the arbitration agreement would be unenforceable, and hence, a question for the court to decide in the first instance. *See* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006). On the other hand, if the crux of the vindication of statutory rights argument is based on an interpretation of the procedures and penalties available in the arbitration procedures, such as limits on discovery, costs, and damages, the question should be for the arbitrator to decide. *See* *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (holding that the arbitrator should decide procedural gateway matters, such as whether an arbitration clause permits a class action).

Thus, *Randolph* turned what had been a measure of equal vindication of federal claims in the arbitral forum into a possible defense to arbitration, if the contesting party could prove that the arbitral forum was so expensive as to deprive the prospective litigant of the opportunity to vindicate statutory rights.

### III. CONCEPCION AND ITS INFLUENCE ON THE VINDICATION OF STATUTORY RIGHTS DOCTRINE

For the next twelve years the Court remained silent as to how to treat a vindication of statutory rights defense. Due to the federal policy favoring arbitration agreements and the attractiveness of more streamlined, potentially cost-effective dispute resolution, employers, manufacturers, and finance companies adopted pre-dispute arbitration agreements with some fervor.<sup>81</sup> These pre-dispute arbitration clauses also evolved to include a binding agreement to proceed in *individual* arbitration, waiving any procedural right to participate in a class proceeding or as a class representative.<sup>82</sup>

Arbitration agreements with class waivers were met with two veins of defenses: state law defenses based on unconscionability and a defense based on the vindication of statutory rights doctrine.<sup>83</sup> Courts struggled with the application of these doctrines for years with little guidance on the enforceability of arbitration agreements that waive a right to proceed as a class representative. But the Court did resolve a number of procedural issues implicating the viability of the class-action/arbitration waiver. In *Buckeye Check Cashing, Inc. v. Cardegna*, the Court held that questions as to the validity of the contract as a whole were for the arbitrator to decide, while questions

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81. See Gilles, *supra* note 14, at 394–98; Stempel, *supra* note 14, at 398 (“The practical consequences of the new legal era were significant. Arbitration left the province of particular business guilds or commercial environments and shifted to a massive privatization of the adjudicatory function. . . . [A] genre of new arbitration arose, in which arbitration agreements were essentially imposed upon a large, general class of consumers and workers.”); see also Lampley, *supra* note 14, at 503–13 (providing a detailed overview of the evolution of arbitration agreements in consumer product sales from first-generation agreements to third-generation incentivizing agreements).

82. See Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 347–49 (2012) (finding class arbitration waivers in 36.5% of consumer arbitration agreements giving rise to AAA arbitrations in 2007, and 100% use of the class waiver in consumer agreements involving cell phones and credit cards in the 2007 AAA sample).

83. See *supra* note 17.

as to the validity of the arbitration clause remained within the province of the court.<sup>84</sup> Then, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court held that it may not be inferred (by an arbitrator or a court) that the parties agreed to class-wide arbitration from an agreement's silence.<sup>85</sup> Thus, parties could not be compelled to participate in class-wide arbitration absent a contractual basis for finding that the parties agreed to do so.<sup>86</sup> The Court's holding in *Stolt-Nielsen* was founded on the recognition that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."<sup>87</sup> The Court observed that in arbitration, parties forgo the judicial rigor and appellate review of the courts for lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.<sup>88</sup> In class arbitration, the arbitrator no longer resolves a single dispute between the parties, but instead resolves disputes between hundreds or even thousands of parties.<sup>89</sup> This drastically raises the stakes of commercial class arbitration, while the scope of judicial review remains limited. Given the vast ramifications posed by class arbitration, it is too great to presume consent to class-wide arbitration based on silence.<sup>90</sup>

Then in *AT&T Mobility, LLC v. Concepcion*, the Court addressed whether a state-law rule (California's) that declared unconscionable

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84. 546 U.S. 440, 445–46 (2006). *Buckeye* extended the separability doctrine first established in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) to state courts. STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.20 (2d ed. 2007). Although *Buckeye* said nothing about the enforcement of class waivers *per se*, it does have important implications on the question of who should decide whether the arbitration clause is enforceable—the court or the arbitrator? If the question as to validity, whether under an unconscionability or vindication of statutory rights defense, is solely raised against the arbitration clause, then the issue should be for the court to decide.

85. 559 U.S. 662, 684 (2010). *Stolt-Nielsen* also left open the question of who should decide the issues regarding the scope of the arbitration clause as it pertains to class proceedings. *Id.* at 679 (noting that the parties assumed the arbitrator must decide whether the arbitration clause permitted class proceedings, but that had never been decided by a majority of the Court).

86. *Id.* at 684.

87. *Id.* at 685.

88. *Id.* at 685–86. Note the implications of this last provision on *Amex III*. Why should expert costs be as great in arbitration as in litigation, when the theoretical ideal is that arbitration is more streamlined, more cost-efficient? Indeed, that is presumably one of the reasons the parties agreed to opt out of litigation in the pre-dispute arbitration agreement.

89. *Id.* at 686. See also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

90. *Stolt-Nielsen*, 559 U.S. at 686–87.

any consumer arbitration agreement in an “adhesion contract” in disputes that involved small amounts of damages, when it was alleged that the party with superior bargaining power had carried out a scheme to cheat consumers out of individual small amounts of money, is preempted by the FAA.<sup>91</sup> Although *Concepcion* did not involve and arguably did not speak to a vindication of statutory rights defense, the application of California’s *Discover Bank* rule was quite similar to a vindication of statutory rights analysis.<sup>92</sup> In sum, if consumers could not vindicate low-dollar claims due to their arbitral consent to forgo the class action, the arbitration agreement would be unconscionable and unenforceable under state law.

The Court held that California’s *Discover Bank* rule is preempted by the FAA because it “interferes with fundamental attributes of arbitration.”<sup>93</sup> Allowing a party to demand class arbitration after a dispute arises thwarts the purpose of arbitration by involving significantly higher stakes, necessitating additional and different procedures, and requiring the complex decision of class-certification.<sup>94</sup> The Court acknowledged the public policy arguments raised by the plaintiffs in favor of permitting class arbitration of such low-dollar claims. First, the *Discover Bank* rule was limited to “adhesion contracts.” But, as the Court noted, “the times in which consumer contracts were anything other than adhesive are long past.”<sup>95</sup> Another component of the *Discover Bank* rule was that “damages be predictably small.”<sup>96</sup> As the Court observed, this requirement is malleable—small compared to what measure?<sup>97</sup> Indeed, the Ninth Circuit had held that damages as high as \$4,000 were sufficiently small to justify invalidation of an arbitration agreement under the *Discover Bank* rule.<sup>98</sup> And the requirement that the consumer “allege a scheme to cheat consumers” was of no

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91. California’s rule, known as the *Discover Bank* rule, operated to render unconscionable, and therefore, unenforceable, almost all consumer arbitration agreements with class waivers. See Lampley, *supra* note 14, at 491–92.

92. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (stating that *Concepcion* “all but resolves this case” because *Concepcion* rejected the argument that class arbitration was necessary to prosecute low value claims).

93. *Concepcion*, 131 S. Ct. at 1748.

94. *Id.* at 1750.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (citing *Oestreicher v. Alienware Corp.*, 322 F. App’x 489, 492 (9th Cir. 2009)).

limiting effect, as that allegation was present in every opposition to a motion to enforce class action/arbitration claims involving consumers.<sup>99</sup>

Finally, the Court responded to the most important argument for “vindication of statutory rights” purposes—the public policy argument that class proceedings are simply necessary to prosecute “small-dollar claims” that otherwise may go unprosecuted.<sup>100</sup> But, under the FAA preemption doctrine, states cannot require a procedure (here, a class procedure) inconsistent with the FAA’s purposes “even if it is desirable for unrelated reasons.”<sup>101</sup> Further, under AT&T’s incentivizing agreement, the Court noted that it was “unlikely” that the claim go unresolved on even an individual basis.<sup>102</sup> AT&T, in a third-generation consumer friendly agreement, provided that it would pay all costs of arbitration for non-frivolous claims and provided an incentive compensation of minimum damages of \$7,500 and double attorneys’ fees if the consumer/plaintiffs obtained an arbitration award greater than AT&T’s last settlement offer.<sup>103</sup> Thus, the Court rejected the “incentive-based” public policy argument for rendering arbitration agreements unconscionable under a state-law defense, but this holding did not necessarily control the applicability of such an argument to a cost-based defense under a vindication of statutory rights theory.

#### IV. COSTS IN THE VINDICATION OF STATUTORY RIGHTS ANALYSIS POST-*RANDOLPH*

Since the *Randolph* Court’s intentional invitation to the lower courts to develop exactly what and how much expense is “prohibitive” to vindicating one’s statutory rights in the arbitral

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99. *Id.*

100. *Id.* at 1753.

101. *Id.* This, of course, leaves open the field of a *federal* vindication of statutory rights defense that would not be hampered by FAA preemption doctrine.

102. *Id.*

103. *Id.* The district court actually found that the plaintiffs were better off under the arbitration agreement than they would have been as class claimants, which could take months or years to resolve and for which the potential recovery may yield only a small percentage of a few dollars. *Id.* I have examined the potential economic benefits to consumers under this type of incentivizing agreement elsewhere. See Lampley, *supra* note 14, at 512–17.

forum,<sup>104</sup> courts have floundered with what costs to include, and what measure to balance the costs against. As this Article discusses below, the different approaches can be summarized as (1) the subjective approach, which compares the costs of arbitration to the litigant's ability to pay; (2) the comparative approach, which compares the costs of arbitration to the costs of proceeding in litigation; (3) the cost/benefit approach, which compares the costs of arbitration to the likelihood of the plaintiff's potential recovery; and (4) the incentive-based approach, which considers whether the plaintiffs or their potential attorneys have any incentive, given the costs involved, to pursue their claims.

Similarly, parties wishing to enforce arbitration agreements have "evolved" such agreements so as to make them impenetrable to both vindication of statutory rights and unconscionability defenses. Thus, arbitration agreements evolved from "first generation" agreements that were one-sided and posed the potential for large fees to the signatory party to "third generation" consumer-friendly arbitration agreements, like the one at issue in *Concepcion*.<sup>105</sup>

#### A. Application of "Excessive Costs"

Surprisingly, in what is the most important case to reach the Court regarding proper application of the vindication of statutory rights doctrine, *American Express Co. v. Italian Colors Restaurant*, the parties spent little argument on the paradigm through which excessive costs should be assessed.<sup>106</sup> Judge Jacobs criticized the

104. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.").

105. Gilles, *supra* note 12, at 846–51 (providing an overview of the evolution of binding arbitration agreements but finding that few companies have offered terms as generous as those at issue in *Concepcion*); Lampley, *supra* note 14, at 503–13 (providing an overview of the evolution of arbitration agreements in consumer product sales from first-generation agreements to third-generation incentivizing agreements).

106. See for Brief for Petitioners at 44, *Am. Express Co.*, 133 S. Ct. 594 (No. 12-133), 2012 WL 6755152 ("But *Randolph*'s reference to 'large arbitration costs' does not support the Second Circuit's decision in this case because it was not a reference to any and all costs, whether in arbitration or litigation. It referred to filing fees, arbitrator's fees, and other administrative fees imposed by the arbitral forum that would not be required to sue in court."); Brief for Respondents at 21, *Am. Express Co.*, 133 S. Ct. 594 (No. 12-133), 2013 WL 267025, at \*44 ("Specifically, the [*Randolph*] Court envisioned a claimant making a particularized showing that the costs of arbitrating under the agreement would be 'prohibitive,' i.e., exceed the maximum

Second Circuit's denial of petition for rehearing *en banc* because the "large arbitration costs" relied on by the Second Circuit to invalidate the arbitration agreement under *Randolph* were not the type of "costs" properly considered under a *Randolph* analysis.<sup>107</sup> Indeed, Judge Jacobs urged that any *Randolph* prohibitive costs analysis must be limited to the "cost of access to the arbitral forum" and the price of admission.<sup>108</sup> For example, Judge Jacobs identified payment of filing fees, arbitration costs, and other arbitration expenses as properly considered "costs."<sup>109</sup> What is not a proper consideration according to the dissenting panel were expenses that would also be incurred in litigation, namely, expert fees.<sup>110</sup> Little attention has been given to the topic, and courts approach the issue with a lack of any consensus.<sup>111</sup> Surprisingly, even the Supreme Court skirted this issue in deciding *American Express*. While the majority of the Court agreed that high expert fees as compared to recoverable damages would not justify invalidating an arbitration agreement under an "effective vindication" rubric, the Court did not include any reasoning as to why such costs are different from the true arbitration costs that could and should be considered under a cost-based defense.<sup>112</sup>

In the first reported case to assess prohibitive costs following *Randolph*, *In re Managed Care Litigation*, the trial court adopted a loose balancing approach by examining the plaintiff-subscriber's filing fees of \$250 against the plaintiff's claimed damages.<sup>113</sup> Without

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potential recovery.").

107. *In re Am. Exp. Merchs.' Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs J., dissenting), *denial of petition for rehearing en banc*. Judge Jacobs's dissent was joined by Judges Cabranes and Livingston.

108. *Id.* (Jacobs, J., dissenting).

109. *Id.*

110. *Id.*

111. David Horton provides an overview of post-*Randolph* treatment of vindication of rights challenges in his article *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 736–41 (2012). Horton argues that courts should link the intensity of judicial review to the specific federal statute at issue. *Id.* at 750.

112. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

113. 132 F. Supp. 2d 989, 999 (S.D. Fla. 2000) *modified on other grounds*, 143 F. Supp. 2d 1371 (S.D. Fla. 2001) and *aff'd by In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002) *rev'd on other grounds by PacifiCare Health Sys. Inc. v. Book*, 538 U.S. 401 (2003). Although the district court minimally addressed the prohibitive cost argument raised by the consumer-plaintiff, the court declined to even recognize that the physician-plaintiffs could sustain a "prohibitive costs" argument based on *Randolph* presumably due to their assumed socio-economic status: "In total, the doctors are sophisticated individuals, not consumers alleging TILA violations in connection with the purchase of a mobile home or employees suing under Title VII." *Id.* The decision in *In re Managed Care* eventually led to the Supreme Court's



discussing the potential recovery, the district court found that the plaintiff's "amount in controversy" was not such a "small sum" to find that the plaintiff had met her burden of showing prohibitive costs to vindication of statutory rights.<sup>114</sup> Given the Court's only indication of what costs should be considered in *Randolph's* footnote six, this filing fee versus recovery analysis was no large stretch, but it still lacked any basis in precedence or application.

But courts struggled with the prohibitive cost analysis. In one of the few cases to thoroughly consider which factors should bear weight in the analysis, *Bradford v. Rockwell Semiconductor Systems, Inc.*,<sup>115</sup> the Fourth Circuit rejected adoption of a *per se* rule that would render unenforceable any employment pre-dispute arbitration agreement that required fee-splitting of the arbitration costs. Instead the court held that *Gilmer* and *Randolph* require a case-by-case assessment of whether arbitration costs in the plaintiff's particular situation will deprive him of vindicating statutory rights in the arbitral forum.<sup>116</sup> The appropriate factors to weigh in this case-by-case analysis, according to the *Bradford* court, are (1) "the claimant's ability to pay the arbitration fees and costs," (2) "the expected cost differential between arbitration and litigation in court," and (3) "whether that cost differential is so substantial as to deter the bringing of claims."<sup>117</sup>

*Bradford* was not the best case in which to launch a cost-based defense because the plaintiff had already pursued arbitration of his ADEA claims and lost, which cast his claim that he could not afford the arbitral forum in a suspicious light.<sup>118</sup> The court held that under the three factors identified above, the plaintiff had not carried his

decision in *PacifiCare*, 538 U.S. at 406–07, in which the Court held that the applicability of a waiver of punitive damages clause in an arbitration agreement to treble damages available under RICO was an issue for the arbitrator to decide, and thus could not form the cornerstone of the plaintiff's "prohibitive costs" argument.

114. *In re Managed Care Litig.*, 132 F. Supp. 2d at 999.

115. 238 F.3d 549, 556 (4th Cir. 2001).

116. *Id.*

117. *Id.* While this inquiry may have some basis in *Randolph*, it is not without problems. Should the enforcement of a pre-dispute arbitration agreement be dependent on the individual socio-economic status of a plaintiff? At what point in time? If a plaintiff is well-off at the time he agrees to arbitration and his financial condition changes, should that be a factor? Given the Court's emphasis on the *prospective* litigant's waiver of rights, it suggests that the plaintiff's ability to afford arbitration should be viewed at the time the agreement was entered into.

118. *Id.* at 558 n.7 ("It therefore makes sense that the individual who claims to be financially burdened by the fee-splitting provision should raise his objections to the fee-splitting arrangement, including a specific forecast of his expected costs and his expected financial burden, *prior to the beginning of arbitration.*") (emphasis added).

burden of showing that the fee-splitting provision rendered arbitration too expensive for him to vindicate statutory rights under the ADEA.<sup>119</sup> Although the plaintiff offered evidence that he was billed \$4,470.88 for his arbitration, the court held that this cost was not insurmountable in light of his \$115,000 base salary and approximate \$50,000 annual bonus.<sup>120</sup> The court also noted that under the plaintiff's arbitration agreement, he would have been entitled to attorneys' fees *had he prevailed*.<sup>121</sup> But the plaintiff failed to offer any evidence of the comparative cost of litigation or the hardship he suffered by being confined to his pre-dispute contractual choice.<sup>122</sup>

This last factor clearly played a weighty force. The court commented that arbitral costs can not be "measured in a vacuum" or measured upon a conclusory statement that costs are "too high."<sup>123</sup> Instead, the analysis "must focus upon a claimant's expected or actual arbitration costs and his ability to pay those costs, *measured against a baseline of the claimant's expected costs for litigation and his ability to pay those costs*."<sup>124</sup>

The *Bradford* factors met with approval in many courts.<sup>125</sup> But in a marked twist on the individualized assessment of *Bradford*, the

119. *Id.* at 558–59.

120. *Id.* at 558 n.6.

121. *Id.*

122. *Id.*

123. *Id.* at 558 n.5.

124. *Id.* (emphasis added).

125. *See, e.g.,* Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1257–60 (11th Cir. 2003) (citing *Bradford* factors with approval and holding that the party opposing arbitration has "an obligation to offer evidence of the amount of fees he is likely to incur, as well as of his inability to pay those fees"); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003) (requiring party opposing arbitration to provide "individualized evidence that it likely will face prohibitive costs in the arbitration at issue and that it is financially incapable of meeting those costs"); Blair v. Scott Specialty Gases, 283 F.3d 595, 609–10 (3d Cir. 2002) (citing *Bradford* factors with approval and remanding for discovery as to actual costs of AAA arbitration in relation to the plaintiff's ability to pay); Boyd v. Hayneville, 144 F. Supp. 2d 1272, 1280 (M.D. Ala. 2001) (finding the plaintiff's allegations of prohibitive costs too speculative when the plaintiff presented evidence of his own financial position, in which he earned \$2,078 of income per month, nearly all of which was by consumer household expenses, and a range of AAA arbitrator fees based on which he estimated his costs for the arbitration would range from \$1,150 and \$6,400). Despite this evidence of his personal financial status and an estimate of potential arbitration costs, the court held the evidence too "speculative" in light of the AAA's provision permitting reduction of costs due to financial hardship. *Boyd*, 1144 F. Supp. at 1280. There was no way to predict what the actual costs might have been. *Id.* Like the *Bradford* court, the *Boyd* court relied on the lack of comparative evidence as to the cost of litigation as a "highly relevant" basis for finding the plaintiff had not met his burden of proof. *Id.* at 1280 n.5 (citation omitted).

Sixth Circuit held in *Morrison v. Circuit City Stores, Inc.*<sup>126</sup> that a claimant seeking to evade enforcement of an arbitration agreement could do so if he proves that the “potential costs of arbitration” are large enough to deter him and “*similarly situated individuals*” from seeking to vindicate their statutory rights.<sup>127</sup>

Under this rubric, the *Morrison* court instructed that the reviewing court should “define the class of such similarly situated potential litigants by job description and socioeconomic background.”<sup>128</sup> While the court should take note of the individual plaintiff’s income and resources, a detailed inquiry into the household budgets of various employees would not be required.<sup>129</sup> Further, the court should determine “average or typical arbitration costs” because that is the information potential litigants would seek in making a decision to pursue statutory claims.<sup>130</sup> The *Morrison* court agreed with *Bradford* that there must be a comparative analysis of the costs of litigation as compared to arbitration, but admonished that these cases must be weighed in a realistic manner—presumably because most plaintiffs in discrimination cases are represented by attorneys on a contingency fee basis.<sup>131</sup> Finally, the court should

126. 317 F.3d 646, 658–65 (6th Cir. 2003) (en banc). The court first rejected the suggestion by the defendant and other courts that any cost-based defense of arbitration should be assessed after the arbitration has taken place. As the court correctly noted, this *post hoc* review of actual costs is riddled with problems: judicial review of arbitral rewards is narrow; the plaintiff who is likely to be deterred by excessive costs will not bring the proceeding at all; and as the *Bradford* court reasoned, once a plaintiff has already availed himself of an arbitral forum, an argument that the forum deprived him of effectively vindicating statutory rights is hardly persuasive. *Id.* at 660–61.

127. *Id.* at 663 (emphasis added). The court grounded this stretch of *Randolph*’s prohibitive costs defense on *Gilmer*’s recognition that federal anti-discrimination statutes play both a remedial and a deterrent role. Thus, to protect the statutory rights at issue, the court held that a reviewing court must consider not only the arbitration’s chilling effect on the plaintiff at issue, but whether similarly situated plaintiffs would be less likely to bring such claims, thereby lessening any deterrent effect. *Id.*

128. *Id.* For employers who use binding arbitration agreements across employee classes, such an undertaking may prove unwieldy with impractical results. As applied to a different class of plaintiffs, consumers, for example, the result lacks basis—should a wealthy purchaser of a cell phone be required to arbitrate claims whereas the indigent purchaser should not?

129. *Id.*

130. *Id.* at 664. Note that a factor not delineated by *Morrison* is an assessment of likelihood to succeed on the merits—which is something that every rational potential litigant would consider if faced with fronting a portion of costs himself.

131. *Id.* at 664. But what precludes an attorney from pursuing arbitration on a contingency fee basis? See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 770 (2006) (“Arbitration costs do not severely restrict, or eliminate, the advantage a

“discount” the possibility that the plaintiff will not be required to pay costs of fees due to success on the merits.<sup>132</sup> Under *Morrison*’s “similarly situated” subjective test, the court conceded that arbitration agreements against high-level managerial employees would likely be enforceable, whereas for lower-level employees, the costs would mean the arbitral forum has a “chilling effect” on vindication of statutory rights.<sup>133</sup>

The application of *Morrison* to the facts of the case was illuminating. The court held plaintiff Morrison’s arbitration agreement was not enforceable because it would deter a number of similarly situated employees from enforcing their statutory rights.<sup>134</sup> Under the plaintiff’s arbitration agreement, her responsibility for arbitration fees and costs would be capped at the greater of \$500 or three percent of her annual salary—a provision that seemingly would be arbitration “friendly.”<sup>135</sup> Nonetheless, the court held that these fee-caps must be considered from the vantage point of the recently terminated potential litigant who faces bills for other necessities and a probable brief period of unemployment.<sup>136</sup> “Turning to the arbitration agreement . . . the potential litigant finds that, as the default rule, she will be obligated to pay half the costs of any arbitration which she initiates.”<sup>137</sup> Based on “minimal research,” the potential plaintiff would discover that arbitrating the dispute could reach thousands, if not tens of thousands of dollars.<sup>138</sup> Faced with the choice of “risking one’s scarce resources in the hopes of uncertain benefit,” the court held that a substantial number of

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consumer has under the contingency fee system. Instead, the contingent fee system provides a mechanism for overcoming possible liquidity and risk aversion constraints due to arbitration costs.”) (internal quotation marks omitted). As the court came to recognize, the most significant expense to be considered will likely be the arbitrator’s fees and costs, which are not incurred in a judicial forum.

132. *Morrison*, 317 F.3d at 664. This cost-shifting provision may be by agreement or due to federal law.

133. *Id.*

134. *Id.* at 669.

135. *Id.* In the plaintiff’s case, her fees would have been capped at \$1,622.

136. *Id.*

137. *Id.* Why the Sixth Circuit adopted the view that the potential litigant would give more credence to a 50 percent splitting provision than the provision limiting fees to \$500 or three percent of the employee’s salary if arranged within ninety days of the award is never explained. *Id.*

138. *Id.* The court based this estimation on a report by Public Citizen, a consumer-advocacy organization, which, as the dissent points out, was marshaling evidence to show why cost-splitting provisions are a “bad idea.” *Id.* at 669, 684.

similarly situated persons would be deterred from seeking to vindicate statutory rights.<sup>139</sup> What the court did not assess was the proven arbitration costs as compared to the potential recovery.<sup>140</sup> Given the application of the fee cap, Morrison herself would face a maximum fee of \$1,622 to pursue her claim—provided she arranged payment within ninety days of an award. Yet even under the limited damages agreement drafted by Circuit City, Morrison stood to collect \$462,000 in damages if she prevailed.<sup>141</sup>

Similarly, in Plaintiff Shankle's case,<sup>142</sup> the court held the arbitration agreement unenforceable when it required the plaintiff to pay one-half of the arbitrator's fees. Relying on information about the "typical employment discrimination arbitration," the appellate court found that the arbitration in this case would cost between \$2,250 and \$6,000.<sup>143</sup> The plaintiff was employed by the defendant as a mechanic and a sales person. In direct contradiction to its earlier holding, the court held: "Even without a searching inquiry into Shankle's income and overall financial situation, we conclude that such a provision would deter a substantial number of similarly situated potential litigants from seeking to vindicate their statutory rights . . . ."<sup>144</sup> The court rejected the defendant's post-dispute offer to pay Shankle's share of the arbitration fee.<sup>145</sup> These two

139. *Id.* at 670.

140. Even the Public Citizen report on which the court relied estimated costs from \$4,350 to \$11,625 for pursuing an \$80,000 claim. *Id.* at 669. Thus, it seems that arbitral costs bear some relation to the amount of damages, as one would expect.

141. If the limitations of damages provisions were severed from the contract, as they were in this case, the plaintiff stood to recover even more than \$462,000. Under a pure comparative approach in which the costs of arbitration are compared to litigation, the potential recovery in damages likely has no proper bearing unless the arbitration agreement greatly *limits* damages. But it is curious in a case that is primarily based on a litigant's subjective ability to pay (as a member of a quasi-class), that no weight at all is given to the litigant's potential recovery.

142. Shankle was an employee of Pep Boys facing a binding pre-dispute arbitration agreement. This case was consolidated with *Morrison* for purposes of appeal on the prohibitive costs issue. *Id.* at 656.

143. *Id.* at 676. This raises the issue of what is the proper role for an appellate court in assessing facts in a preliminary prohibitive costs defense to a motion to compel arbitration. Are averages enough, or should the plaintiff be held to prove what his individual arbitration is likely to cost? If the latter, the obstacles to proof are real. How can one ever truly know, before going through the filing fee and arbitrator selection process (and any negotiations regarding fee waivers), precisely how much arbitral fees will be?

144. *Id.*

145. Since *Morrison* and cases like it, drafters of arbitration agreements are well-advised to offer to pay the arbitration fees, or at least a substantial portion of them, if they know the claims

applications show that the *Morrison* court was primarily concerned with two factors: (1) the party opposing arbitration's ability to pay (the subjective approach) and (2) a concern about the broad social purposes of private enforcement of federal statutory rights. This last factor is a concern that would play heavily in light of the class waiver.

*B. Analysis of Prohibitive Costs in Light of a Class Waiver*

As courts grappled with which factors could be used to establish prohibitive costs and whether that analysis should be individualized or should apply to a class of plaintiffs, proponents of mandatory arbitration also began incorporating a class waiver that required the signatory to submit any post-agreement claims to individualized arbitration and waive any procedural right to proceed as a class. The effect of such waivers meant that some class claims—claims not worth pursuing in individual arbitration—simply would not be brought. But how should the effect of these waivers be viewed in light of *Randolph's* admonition that an arbitration agreement that deprives a prospective litigant of the opportunity to vindicate a statutory right will not be enforced?

In *Kristian v. Comcast Corp.*, the First Circuit became one of the first courts to invalidate an arbitration agreement with a class arbitration waiver because it posed “prohibitive costs” to vindicating statutory rights.<sup>146</sup> The *Kristian* plaintiffs attempted to assert class claims for federal and state antitrust violations against Comcast, but Comcast's arbitration agreement included a non-severable class

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are likely to involve damages in amounts that are less than the typical arbitration. See Lampley, *supra* note 14, at 512–17; see also *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 509–11 (6th Cir. 2004) (adopting *Morrison* and emphasizing that a court must evaluate the cost of arbitration not only relative to the litigant's ability to pay, but “relative to the likely costs of litigation”).

146. 446 F.3d 25, 61 (1st Cir. 2006) (“If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs will be unable to vindicate their statutory rights.”). *Kristian* correctly recognized that there may be a question as to whether the presence of a class arbitration bar poses a “question of arbitrability” to be decided by a court, rather than an arbitrator under *Bazzele* and *PacificCare*. Because *Randolph* was decided before either *Bazzele* or *PacificCare*, it did not address whether the issue of prohibitive costs preventing a prospective litigant from vindicating statutory rights should be a question of arbitrability resolved by a court instead of an arbitrator. Nothing, however, suggests that this question—whether a prospective litigant is deprived of enforcing statutory rights at all due to the operation of the arbitration clause—should be a question outside of *Bazzele's* grant of authority for the court.

arbitration waiver.<sup>147</sup> The plaintiffs argued that the arbitration agreement—by depriving them of the opportunity to pursue class claims—deprived them of the opportunity to vindicate their antitrust claims.<sup>148</sup> The plaintiffs submitted expert affidavits by (1) an attorney with twenty-six years of experience in litigating class actions; (2) a former justice of the Massachusetts Superior Court; and (3) an economist, who opined that to prove their claims, the plaintiffs would have to undertake an elaborate factual inquiry that included defining the relevant market; establishing the market power of the defendants and the effects of potential competition; determining the impact of any non-incumbent competitors in the market; analyzing the alleged violative agreements, as well as any merger/asset purchase agreements in which defendants had been involved; analyzing rate increases over time; and otherwise calculating damages.<sup>149</sup>

The plaintiffs' economist estimated that expert fees would cost between \$300,000 and \$600,000, not including direct costs such as "travel" and "computer analysis."<sup>150</sup> The plaintiffs' class-action attorney who was proffered as an expert averred that "competent attorneys" would "expend several million dollars of attorneys' time and hundreds of thousands of dollars in expenses, including expert witness fees."<sup>151</sup> According to these experts, each putative class member's recovery, even if trebled according to the antitrust statute, would range from a "few hundred dollars to perhaps a few thousand dollars."<sup>152</sup> Todd, the former state court justice proffered by the plaintiffs as an expert, opined that "the individual consumer/subscriber's cases would be extremely compromised, and effectively precluded, without the testimony of expert witnesses."<sup>153</sup>

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147. *Id.* at 30–32.

148. *Id.* at 37.

149. *Id.* at 58.

150. *Id.* The court never questioned the necessity of using such experts—a class-action attorney and a former judge—as experts in an antitrust case.

151. *Id.*

152. *Id.* at 54.

153. *Id.* at 58. If the "costs" observed in *Kristian* are indeed the appropriate costs a court should consider under a prohibitive costs argument, the next question is whether opinions offered by judges and members of the bar opining that the costs of the case will prevent bringing such claims are of the type admissible under Federal Rule of Evidence 702, or whether Rule 702

Giving no mention to the *Bradford* factors or even a *Morrison* analysis, the court held that Comcast's arbitration agreement was unenforceable as drafted because it deprived the plaintiffs of the opportunity to vindicate their statutory rights.<sup>154</sup> This prohibitive costs holding was based on (1) the "complexity of an antitrust case generally,"<sup>155</sup> (2) the costs of plaintiffs' proposed expert fees as contrasted to each plaintiff's potential recovery, and (3) the lack of a monetary incentive to encourage attorney representation in individual antitrust arbitration.<sup>156</sup> The *Kristian* court failed to recognize that even if individual claims could not be aggregated in a formal class proceeding pursuant to the arbitration agreement, nothing prevented the plaintiffs—and the plaintiffs' attorneys—from informally coordinating efforts on factual discovery, expert witness, and litigation preparation to defray costs. Putting aside this oversight, the *Kristian* court's holding can basically be attributed to a lack of incentives for the consumer to pursue low-dollar claims and a lack of incentives for attorneys to represent consumers in connection with low-dollar claims.<sup>157</sup> Most notably absent from *Kristian*'s holding was any requirement that plaintiffs compare the costs of proceeding in arbitration versus the costs of pursuing litigation.<sup>158</sup>

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should even apply.

154. *Id.* at 58–59. The *Kristian* court did acknowledge that the weight of circuit courts had found no "prohibitive costs" defense based on the class-action waiver in the context of Truth in Lending claims. *See id.* at 56–58 (analyzing *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000)). But the court distinguished those cases based on the complexity of prosecuting an antitrust claim and the imbedded costs involved in fees as alleged by the plaintiffs' experts. *Id.* at 58. Instead, the court likened this case, in which the plaintiffs would have no incentive to pursue their claims, to cases in which courts had found class action/arbitration waivers unconscionable. *Id.* at 60 (finding support in *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003)).

155. *Id.* at 58.

156. *Id.* at 59 & n.21. *Kristian* recognized that antitrust statutes provide for an award of attorney's fees to prevailing plaintiffs. But it reasoned that, aside from being a poor investment, "being made whole is hardly a sufficient incentive for an attorney to invest in a case such as this when time spent on more predictable cases would be advantageous, and frankly, rational." *Id.* at 59 n.21.

157. *Id.* at 61. The response to the *Kristian* court's vindication-of-statutory-rights decision based on the consumer's lack of incentives is that it would be entirely reasonable for the prospective litigant to relinquish the right or capability to litigate expensive, complex claims with a proportionally small payoff in exchange for the opportunity to cost effectively arbitrate more substantial claims with a proportionally advantageous payoff.

158. The court also found the class arbitration waiver severable and ordered the arbitration to proceed on a class or consolidated basis. Of course, this piece of the court's holding is called into serious doubt by *Concepcion*, which recognized the inherent infeasibility of arbitrating class claims when the parties did not specifically contemplate this result. *AT&T Mobility LLC v.*



*Kristian's* holding that an arbitration agreement that deprives litigants of an incentive to arbitrate claims when the litigants could not proceed as a class caught on in the wake of class action/arbitration waivers. In *Dale v. Comcast Corp.*, the Eleventh Circuit reframed the analysis as a “totality of the facts and circumstances test” in which relevant circumstances include:

[T]he fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.<sup>159</sup>

This broad “totality of facts and circumstances” test proffered by the *Dale* court is a far stretch from the original *Bradford* cost-based factors. It also conflates traditional “unconscionability” arguments based on fairness of the provision and public policy with what, prior to *Kristian*, was a relatively straight-forward inquiry about the cost of arbitration as compared to litigation or the litigant's ability to pay.

Following *Concepcion*, some courts have rejected the argument embraced in *Kristian* that by dissolving any “incentive” to bring suit via a class waiver, the arbitration agreement is unenforceable as prohibiting the plaintiffs from vindicating statutory rights.<sup>160</sup> In *Coneff v. AT&T Corp.*, the court was faced with the same fee-shifting and consumer-friendly provisions present in *Concepcion*.<sup>161</sup> The plaintiffs launched a two-pronged argument: (1) that the class action/arbitration waiver was prohibitively expensive because the claims at issue were worth much less than the costs of litigating them; and (2) even if the consumer-friendly provisions of the arbitration agreements would make plaintiffs whole, most customers lacked any incentive to bring such claims.<sup>162</sup> The court held that

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*Concepcion*, 131 S. Ct. 1740, 1751 (2011).

159. 498 F.3d 1216, 1224 (11th Cir. 2007).

160. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011) (rejecting the plaintiff's argument that the class-action/arbitration waiver prohibited them from vindicating statutory rights based on the conclusion in *Concepcion* that under the same fee-shifting agreement, consumers would be made whole).

161. 673 F.3d at 1158.

162. *Id.* at 1158–59.

*Randolph* is still viable law in light of *Concepcion*—if a plaintiff faces costs that would render arbitration prohibitively expensive such that the plaintiff cannot vindicate statutory rights, then the arbitration agreement may be unenforceable. But, on a factual basis, the *Coneff* court held that the actual presence of prohibitive expenses in this same agreement had been addressed by *Concepcion*, which concluded that by virtue of the fee-shifting and “windfall” provisions, the consumers would be made whole, if not better off, by proceeding in arbitration as opposed to class litigation.<sup>163</sup> As to the argument that no rational consumer would bring such a low-value claim individually,<sup>164</sup> the *Coneff* court held that *Concepcion* precludes the consideration of this “policy-related” concern.<sup>165</sup>

### *C. Culmination of Prohibitive Costs: In re American Express Litigation*

In the most anti-arbitration case since *Concepcion*, *American Express*, the Second Circuit affirmed its prior holding(s) that the “cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”<sup>166</sup> What is truly unusual about *American Express* is that this agreement was between two business entities—American Express and individual small business owners—as opposed to between a consumer and a corporation or employer and employee.<sup>167</sup> In this near-classic commercial dispute, the parties have been litigating for nine years about whether the plaintiffs’ agreement to waive the procedural opportunity to participate in arbitration as a class is enforceable.<sup>168</sup> The Second Circuit visited

163. *Id.*; see also *Concepcion*, 131 S. Ct. at 1753.

164. This is an “incentive” argument as opposed to the earlier “means” argument.

165. *Coneff*, 673 F.3d at 1159 (relying on a one sentence response to the dissent in *Concepcion* which acknowledged that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” (quoting *Concepcion*, 131 S. Ct. at 1753)). Whether this statement in fact foreclosed any incentive-based argument based on prohibitive costs is indeed questionable.

166. *Amex III*, 667 F.3d 204, 217 (2d Cir. 2012).

167. *In re Am. Express Merchs.’ Litig.*, No. 03 CV 9592, 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006) *rev’d and remanded sub nom In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 302 (2d Cir. 2009), *cert. granted, judgment vacated* *Am. Exp. Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) [hereinafter “*Amex I*”]; *In re Am. Express Merchs.’ Litig.*, 634 F.3d 187, 188–89 (2d Cir. 2011) *adhered to on reh’g*, *In re Am. Exp. Merchs.’ Litig.*, 634 F.3d 187 (2d Cir. 2011) [hereinafter “*Amex II*”]; *Amex III*, 667 F.3d at 207.

168. It is worth noting that the plaintiffs filed suit in 2003. American Express moved to dismiss the case in favor of arbitration in 2004. Docket Entry 20, *In re Am. Express Litig.*

this issue four times.<sup>169</sup> Each time the Second Circuit found the arbitration agreement with class waiver to be unenforceable due to prohibitive costs.<sup>170</sup> Most recently, five of the thirteen active judges on the Second Circuit dissented from the Second Circuit's denial of American Express's petition for rehearing *en banc*, with Judge Cabranes appealing that "the matter can and should be resolved by the Supreme Court"<sup>171</sup> and Chief Judge Jacobs declaring that appellate review is necessary because *American Express* "is already working mischief in the district courts."<sup>172</sup>

The *American Express* plaintiffs are merchants who accepted defendant American Express's payment card products.<sup>173</sup> The plaintiffs sought to bring claims for alleged antitrust violations on behalf of a national merchant class.<sup>174</sup> However, the plaintiffs each

1:03CV09592. And the parties have been caught up in the arbitration web for the past nine years. This is certainly not the easy, streamlined alternative resolution process the parties presumably contemplated when they originally agreed to arbitrate their claims.

169. See *supra* note 167; *In re Am. Express Litig.*, 681 F.3d 139 (2d Cir. 2012) (denying petition for rehearing *en banc*) [hereinafter *Amex IV*].

170. *Amex III*, 667 F.3d at 206 (concluding that the Supreme Court's decision in *Concepcion* does not alter the Second Circuit's previous analysis).

171. *Amex IV*, 681 F.3d at 149 (Cabranes, J., dissenting from denial of rehearing *en banc*).

172. *Id.* at 143.

173. These plaintiffs came from two different geographic regions: New York and California. *Amex I*, 554 F.3d 300, 305 (2d Cir. 2009). The National Supermarkets Association, which represents the interests of individually owned supermarkets, was also a named plaintiff. *Id.*

174. The merchant agreement to which the plaintiffs agreed included an "Honor All Cards" provision, which required the plaintiffs to accept all American Express cards. *In re Am. Express Merchs.' Litig.*, 03 CV 9592 (GBD), 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006) at \*1. At the heart of the dispute is the distinction between "charge cards" and "credit cards." *Amex I*, 554 F.3d at 305. A charge card requires its holder to pay the balance in full at the end of each billing cycle. In contrast, a credit card permits the holder to pay a portion of the balance at the end of each billing cycle, and interest accrues on the remaining balance. *In re Am. Express Merchants Litig.*, 2006 WL 662341 at \*1 n.6. According to the plaintiffs, "[h]olders of charge cards are more affluent than credit cardholders, and a vastly higher percentage of charge cards than credit cards are held by businesses and used for business travel and other corporate purposes." 554 F.3d at 307. Indeed, the plaintiffs alleged that Amex itself contended that "the average purchase on an American Express card is 17% higher than the average purchase made on a credit card." *Id.* Thus, the plaintiffs-merchants wanted to attract "charge card" customers who were likely to spend more money, and Amex has been able to charge high merchant discount fees. *Id.* The plaintiffs allege that Amex's fees were at least 35% higher than Amex's competitor rates. *Id.* at 308.

By requiring that a merchant agree to Amex's "Honor All Cards" provision, Amex was able to leverage its market dominance in charge cards to generate equally large fees for its burgeoning credit card business. *Id.* The practice of requiring a merchant to honor all of its cards, according to Plaintiffs, amounted to an illegal tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *Id.* Plaintiffs also asserted claims alleging that Amex

signed an arbitration agreement waiving any procedural right to participate in arbitration in a representative capacity or as a member of a class.<sup>175</sup> Each time this case has been examined by the Second Circuit (on initial review, and then on remand following *Stolt-Nielsen* and *Concepcion*), the court has held, “as a matter of law,”<sup>176</sup> that the costs of individual arbitration would be prohibitive.<sup>177</sup>

The Second Circuit’s panel decisions are based on evidence presented by the plaintiffs that is similar to that presented in *Kristian*.<sup>178</sup> The plaintiffs submitted the affidavit of Dr. French, an economist who offered opinions regarding “the likely costs and complexity of an expert economic study concerning the liability and damages” related to the antitrust action, and “whether it would be economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding.”<sup>179</sup>

The plaintiffs’ expert opined that the cost of his own consulting firm’s expert assistance in “individual plaintiff antitrust cases has ranged from about \$300 thousand to more than \$2 million.”<sup>180</sup> He opined that the individual cost for the *Amex* plaintiffs would fall in the middle of this range,<sup>181</sup> at something over \$1 million. The plaintiffs’ expert went on to aver that:

The median volume merchant, with half of the named plaintiffs having more and half having less American Express charge volume, and having reported \$230,343 American Express Card volume in 2003, might expect four-year damages of \$1,751, or \$5,252 when trebled. . . . The largest volume named plaintiff merchant, with reported American Express Card volume of \$1,690,749 in 2003,

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maintains a monopoly by imposing a collective action waiver in violation of Section 2 of the Sherman act, and various state common law claims for unjust enrichment and violations of California’s Unfair Competition Law. 2006 WL 662341 at \*2.

175. *Amex III*, 607 F.3d at 209.

176. It is curious that the court framed this intensely factual-based finding as a “matter of law.” *Id.* at 217.

177. Now Supreme Court Justice Sotomayor was on the panel of *Amex I*. Each subsequent panel on remand has been addressed by the remaining panel of Judges Pooler and Sack. Justice Sotomayor recused herself from the Supreme Court’s review of *Amex III*.

178. See *supra* Part IV.B. and accompanying notes.

179. *Amex III*, 667 F.3d at 217.

180. *Id.*

181. *Id.*

might expect four-year damages of \$12,850, or \$38,549 when trebled.

*In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed \$1 million.*<sup>182</sup>

Based on this opinion, the Second Circuit found that “trebling of a small individual damages award is not going to pay the expert fees Dr. French has estimated will be necessary to make an individual plaintiff’s case” here.<sup>183</sup> The Second Circuit held that the district court failed to consider that the Supreme Court has held that when a prevailing party seeks reimbursement of fees paid to its own expert witnesses, the federal court is bound by the limits of 28 U.S.C. § 1821(b)—an amount that is currently forty dollars per diem.<sup>184</sup> Even more importantly, the court held that the fee-shifting provisions of the Clayton Act must be discounted to include “the risk of losing, and thereby not recovering any fees” to fully encompass a potential plaintiff’s evaluation of the suit’s potential costs.<sup>185</sup>

The court found that this cost-based analysis of the prospective litigants’ rational choice “flatly ensures that no small merchant may challenge American Express’s tying arrangement under the federal antitrust laws.”<sup>186</sup> Because the class waiver effectively precluded the plaintiffs from enforcing statutory rights, the court held it unenforceable.<sup>187</sup> The two-judge panel continued to assert two important “caveats” to its decision: (1) that the decision “in no way

182. *Id.* at 218 (emphasis added).

183. *Id.*

184. *Amex I*, 554 F.3d 300, 318 (2009) (quoting *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 439, 107 (1987) *superseded by statute*, 42 U.S.C. § 1988(c) (1991) *as recognized in* U.S. Equal Emp’t Opportunity Comm’n v. W&O Inc., 213 F.3d 600, 620 (2000)). Whether the district court failed to consider this limitation is not entirely clear. From the district court’s opinion, it found that the benefits of treble damages and fee-shifting provided sufficient incentive for plaintiffs to bring individual suit—not that the entirety of the plaintiffs’ arbitration costs would be funded if successful. Indeed, in a litigation context rarely are the prevailing parties able to recover 100% of costs, expert fees, and attorney fees. *Amex I*, *supra* note 166, at \*1.

185. *Amex III*, 667 F.3d at 218 (quoting *Amex I*, 554 F.3d at 317).

186. *Id.* (quoting *Amex I*, 554 F.3d at 319).

187. *Id.*

relies on the status of plaintiffs as ‘small’ merchants;”<sup>188</sup> and (2) that the court did not hold that class-action waivers in arbitration, or even arbitration of antitrust matters were *per se* unenforceable.<sup>189</sup> These limitations were important because the first was an attempt to distinguish this decision concerning commercial litigants purportedly enforcing a federal statute from the consumer line of cases (notably *Discover Bank*), rendering such clauses unenforceable because they were unconscionable under state law. The second limitation was the Second Circuit’s way of “saving” the decision in this case from a wide-arching decision invalidating all arbitration clause-class waivers, which would most likely (and eventually was held to be) preempted by the Supreme Court.

Despite these attempts to distinguish the consumer “unconscionability” cases, the Second Circuit’s factors it found relevant to the vindication of statutory rights analysis look and sound very much like those found in state common law unconscionability rubrics: “the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery, the ability to recover attorneys’ fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company’s ability to engage in unchecked market behavior, and related public policy concerns.”<sup>190</sup>

The court reconciled its opinion with *Concepcion* by limiting *Concepcion* to the context of California’s state rule that required class-

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188. *Amex I*, 554 F.3d at 321 (quoting *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007)). This is a curious disclaimer given the express holding that “no small merchant” would be able to challenge American Express’s tying arrangement. *Id.* at 218. The court elaborated that it relied instead on the need for plaintiffs to have the opportunity to vindicate statutory rights. The court necessarily had to make it clear that this holding rested on the vindication of statutory rights defense to preserve its vitality after *Concepcion*. *Id.* at 219.

189. *Id.* at 219.

190. *Id.* at 213. *Cf.* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Ca. 2005) *overruled by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (“[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (internal quotation marks omitted)).

wide arbitration in circumstances that met the *Discover Bank* factors.<sup>191</sup> To give the Second Circuit some credit, some commentators have noted *Concepcion*'s enigmatic decision.<sup>192</sup> When faced with the opportunity to hold that class-action waivers with certain provisions are presumed enforceable under the FAA, the Court did not reach so far. Instead, the Court held that the *Discover Bank* rule was preempted and that the FAA did not contemplate the complexity of class arbitration.<sup>193</sup>

Nonetheless, *Concepcion* was clearly a strong pro-arbitration case. The Second Circuit admitted as much when it stated that "it is *tempting* to give both *Concepcion* and *Stolt-Nielsen* . . . a facile reading, and find that the cases render class action arbitration waivers *per se* enforceable."<sup>194</sup> But the court rejected this reading and explained that its prior *Amex* decisions addressed the issue of "whether a class-action arbitration waiver clause is enforceable *even if* the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights."<sup>195</sup> This question, according to the court, had not been addressed by *Concepcion* or *Stolt-Nielsen*. Thus, *Concepcion* and *Stolt-Nielsen*, taken together, were read by the Second Circuit to stand "squarely" for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agreed to do so.<sup>196</sup>

In contrast to the arbitration agreement addressed by the Court's 2011 decision in *Concepcion*, the *Amex* agreement did not contain an imbedded fee-shifting provision by which American Express agreed to pay some or all costs of arbitration, regardless of whether the plaintiff prevailed.<sup>197</sup> It also did not have an "incentivizing clause" by which American Express would pay an individual plaintiff a "windfall" for claims not timely and appropriately settled by

191. *Amex III*, 667 F.3d at 213.

192. See, e.g., Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L.J. SUPPLEMENT 31, 32 (2012) (acknowledging that the majority opinion in *Concepcion* is "open to multiple interpretations").

193. *Amex III*, 667 F.3d at 212 (attempting to limit *Concepcion* to a case concerning preemption of a state law unconscionability rule).

194. *Id.* (emphasis added). While it would be a stretch to consider *Stolt-Nielsen* this broadly, *Concepcion* comes close.

195. *Id.* (emphasis added).

196. *Id.*

197. *Id.* at 209–10.

American Express outside of the arbitration process.<sup>198</sup> Given that the American Express merchant contract was an agreement between two businesses (although not necessarily at “arms length”),<sup>199</sup> it is not unreasonable that American Express would expect any prospective litigant to fund its own costs of dispute resolution, as would any commercial litigant in court. Nonetheless, the plaintiffs conceded by the time this case reached the Court, that had such provisions been present, they would have been unable to succeed in the lower court on a prohibitive costs basis.<sup>200</sup>

Thus, the Second Circuit relied on *Kristian* to employ a mixture of a cost-benefit and incentive-based approach to hold that the class waiver in the *Amex* arbitration agreement deprived the plaintiffs of vindication of their antitrust claims. The court’s two-pronged approach was based on the opinion of an economist that expert fees would outweigh any potential plaintiff’s individual recovery (the cost/benefit approach) and the economist’s opinion that no rational litigant would pursue these claims (the incentive approach).

#### V. *AMERICAN EXPRESS* FAILS TO ADDRESS THE ANALYTICAL FRAMEWORK FOR A COST-BASED DEFENSE

During the publication of this Article, the Court issued its opinion in *American Express*.<sup>201</sup> As predicted, the Court reversed the Second Circuit’s opinion in *American Express* and held that the arbitration agreement is enforceable despite the plaintiffs’ lack of economic incentives to pursue individual arbitration claims.<sup>202</sup> What is somewhat surprising is that the Court’s opinion almost entirely avoided the issue of what type of costs should be properly considered in analyzing a cost-based defense to arbitration.<sup>203</sup>

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198. *Id.*

199. The district court found that the Amex merchant agreement was a form contract and could not be negotiated with individualized terms by the merchant plaintiffs. *Amex I*, *supra* note 167, at \*2.

200. Brief for Respondents at 44, *Am. Express Co.*, 133 S. Ct. 594 (No. 12-133), 2013 WL 267025, at \*44 (“If Petitioners’ arbitration clause contained such pro-vindication clauses [such as fee and cost-shifting], Respondents would not be here.”).

201. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013).

202. *Id.* at 2310.

203. *See id.* at 2317–18 (Kagan, J., dissenting) (recognizing that while the majority is “quite sure that the effective-vindication rules does not apply” it “has precious little to say about why” and discussing the majority’s failure to address the seminal issue in the case, which is what type of costs are properly considered in a cost-based defense to arbitration).



The Court's decision rested on two grounds. First, the Court recognized an issue not specifically in contention—there is no Congressional command in the Sherman Act or elsewhere that antitrust laws evince an intention to preclude a class-action waiver.<sup>204</sup> As the Court recognized, the antitrust laws were enacted before Federal Rule of Civil Procedure 23 and long before popular use of the class waiver in arbitration.<sup>205</sup> Therefore, Congress would not likely have included such a provision at the time of their enactment. Yet the inclusion of this basis in the Court's opinion sends a clear message to Congress: speak clearly as to the class-waiver issue in any federal statute, or it may be subject to individual arbitration.

The Court then turned to the central issue in the case: whether enforcing the class-action waiver deprives the litigants of effective vindication of rights under the antitrust laws because they had no “economic incentive” to pursue individual arbitration claims in light of high expert costs.<sup>206</sup> Scalia, writing for the majority, first discussed the origin of the “effective vindication” doctrine, recognizing it as a judge-made exception originating out of *Mitsubishi Motors*.<sup>207</sup> But without explanation, the majority called the entire existence of the effective vindication doctrine into question by characterizing *Mitsubishi's* holding, previously relied on by courts in hundreds of cases since, as mere “*dictum*.”<sup>208</sup> Why the Court ventured thus far is not clear from the opinion—there was no need to call into question the “effective vindication” doctrine to resolve this case. And the Court certainly did not go so far as to overrule *Mitsubishi* or the long line of cases recognizing the effective vindication defense. Still further, the Court's attempt to characterize *Mitsubishi's* holding as limited to a “right to pursue statutory remedies” appearing in a footnote is suspect.<sup>209</sup> As discussed in Part II.A. above, the cornerstone of *Mitsubishi's* holding is that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function,” and the arbitral forum may be enforced.<sup>210</sup>

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204. *Id.* at 2309.

205. *Id.*

206. *Id.* at 2310.

207. *Id.* See also *supra* notes 35–48 and accompanying text.

208. *Id.*

209. *Id.* at 2309.

210. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

The Court could not seriously have intended to call into question the entire existence of this doctrine that has been the rule nearly thirty years, as evidenced by the majority's reliance on subsequent cases asserting the existence of the "effective vindication" exception.<sup>211</sup> Nonetheless, whether the "effective vindication" doctrine is now narrowed to only a *right to pursue*, as opposed to vindicate, federal statutory claims is something left for later cases to resolve. Under either characterization, the possibility still exists that exorbitant costs could pose a barrier to even pursuit of statutory claims. The question unanswered by the Court is what type of costs could lead to a viable cost-based defense.

There is, of course, some common ground. The majority and dissent agree that *Mitsubishi's* "effective vindication" doctrine would "certainly" require invalidating an arbitration agreement prospectively forbidding the right to recover under federal statutory rights.<sup>212</sup> And the Court mentioned, enigmatically, that the "effective vindication" doctrine would "perhaps" operate to invalidate an arbitration agreement in which "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable."<sup>213</sup> The "perhaps"

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Justice Kagan addressed the majority's shortcomings on this ground in her dissent, joined by Justices Ginsburg and Breyer: "The majority is *dead wrong* when it says that *Mitsubishi* reserved judgment on 'whether the arbitration agreement's potential deprivation of a claimant's right to pursue federal remedies may render that agreement unenforceable.'" *Amer. Express*, 133 S. Ct. at 2317 n.3 (emphasis added). As the dissent recognizes, the effective vindication doctrine "began as a core part of *Mitsubishi*." *Am. Express*, 133 S. Ct. at 2317 (quoting *Mitsubishi*, 473 U.S. at 637).

211. *Am. Express*, 133 S. Ct. at 2317 at 2310 (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74, (2009) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Professor Jean Sternlight has written: "With this decision the Court has also fully endorsed companies' use of mandatory arbitration provisions to block access to justice rather than to provide an alternative means of obtaining access to justice." Jean Sternlight, *American Express Co. v. Italian Restaurant Guts Enforcement of Federal Laws*, ADR PROF BLOG, (June 2013), available at <http://www.indisputably.org/?p=4750>. *American Express*, limited to its holding that the vindication of statutory rights doctrine cannot be used to render arbitration agreements unenforceable based on an argument that plaintiffs lack economic incentives to bring such claims, cannot be said to block access to justice. This is because plaintiffs will simply not bring claims they otherwise would not bring in court individually. But, if *American Express* is construed to mean that a true cost-based defense, in which the costs of arbitration are prohibitively expensive under a comparative framework, is no longer a viable defense, then Professor Sternlight's characterization of this case meets the mark.

212. *Id.* at 2310, 2313. But because the "effective vindication" doctrine is likely limited to vindicating federal rights, it would be of no help for a prospective waiver of recovery under state law.

213. *Id.* at 2310–11. The dissenters would have no problem holding that the effective vindication rule covers such filing fees. *Id.* at 2314 (acknowledging that an agreement might

modifying this principal is certainly a troubling foreshadowing for future “effective vindication” cases, because the fact that arbitration costs as compared to litigation costs could pose an impermissible barrier to vindication of federal statutory rights has been the accepted state of the law since *Randolph*.<sup>214</sup> And, as argued in this Article, is the analytical framework for any cost-based defense that adequately serves the purpose of the FAA and effective vindication of federal law. On the other end of the spectrum, what is clearly *not* covered by the “effective vindication” doctrine are “low value” claims, which are not economically rational to pursue individually because the costs of arbitration/litigation outweigh the potential recoverable damages.<sup>215</sup> Thus, the Court inherently rejected any rubric that would permit invalidating an arbitration clause under an incentive-based approach alleging that the costs of individual arbitration prevent the effective vindication of federal rights.

But what is left after *American Express* is some significant middle ground with unanswered questions. In the hypothetical posed by the dissent, Justice Kagan asks if the effective vindication rule would prohibit an arbitration agreement that precludes a claimant from presenting proof intrinsic to the plaintiff’s claim—such as economic testimony?<sup>216</sup> The majority does not take the bait, responding only that “it is not a given” that such a clause would constitute an impermissible waiver. But more importantly, the majority points out, if such a clause did render vindication of a statutory right impossible, the result would be the same individually or as a class.<sup>217</sup>

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prohibit vindication of statutory rights by setting “outlandish” filing fees, or establishing an absurd statute of limitations).

214. See *supra* Part IV.A. The Court’s calling into question the use of a cost-based defense based on arbitration fees as compared to litigation fees is particularly surprising given that such dicta was not necessary to reach the Court’s holding, and the fact that some of the majority expressed the view in oral argument that such a comparison was, indeed, proper. See *infra* note 240. The primary reason that the majority may be shying away from an arbitration vs. litigation cost comparison is that it would require some “tallying” of the arbitration costs vs. litigation costs in the enforcement phase. *American Express*, 133 S.Ct. at 2311–12. But this tallying should not impose the type of costs and burdens that would be unwieldy or defeat the purpose of the FAA.

215. *Am. Express*, 133 S. Ct. at 2311.

216. *Id.* at 2314.

217. *Id.* at 2311. Why is this such an important distinction? Because the plaintiffs in *American Express* claimed that it was the contractual waiver of the class action that deprived them of the ability to effectively vindicate their antitrust claims. But as the Court noted, this is simply

In sum, although *American Express* continues the Court's favorable treatment of arbitration as the alternative path to litigation and demonstrates that waiver of the class action is here to stay (until or unless Congress precludes it), the Court did not specifically adopt any framework to guide the lower courts as to how to analyze a cost-based defense under *Mitsubishi/Randolph*.<sup>218</sup> As discussed below, the comparative approach is the sole approach that is consistent with *Mitsubishi, Randolph*, and now *American Express*.

#### VI. ANY DEFENSE TO ARBITRATION BASED ON PROHIBITIVE COSTS SHOULD BE BASED ON COMPARING TRUE ARBITRAL COSTS TO LITIGATION COSTS

Since the Court's recognition of a prohibitive-costs-based defense in *Randolph*, lower courts have analyzed the costs that must be proven to avoid arbitration under four different rubrics: (1) the subjective approach, which compares the costs of arbitration to the litigant's ability to pay;<sup>219</sup> (2) the comparative approach, which

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a limitation of arbitration to the individual contracting parties, not a foreclosure of the cause of action, prohibition of proof, or deprivation of a statutory remedy. *Id.* at 2311.

218. One key issue that both the Court and the dissent inadequately addressed in *American Express*, was the possibility, or impossibility, of the plaintiffs sharing the costs of the allegedly prohibitively expensive expert fees even if they could not proceed as a class. *See id.* at 2311 n.4 (arguing that cost-sharing was permitted)); and *id.* at 2318 (Kagan, J., dissenting) ("The agreement's problem is that it bars not just class actions, but also all mechanisms—many existing long before the Sherman Act, if that matters—for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses."). If plaintiffs could have shared such fees, even in the form of a trade agreement to hire an expert, this should have allayed any prohibitive cost concern and should have resolved the case. *See* Transcript of Oral Argument at 20–21, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012). The Court's avoidance of this issue is confounding, particularly given the petitioner's concession at oral argument that such costs could be shared. *Id.* at 20:20–22:6.

219. *See, e.g., Morrison v. Circuit City Stores*, 317 F.3d 646, 658–65 (6th Cir. 2003) (holding that "the reviewing court should define the class of such similarly situated potential litigants by job description and socioeconomic background. It should take the actual plaintiff's income and resources as representative of this larger class's ability to shoulder the costs of arbitration" in considering whether the arbitration agreement posed prohibitive costs); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (analyzing the litigant's projected costs of arbitration in comparison with evidence that the claimant would not be able to pay the equal burden of cost due to her limited financial capacity to determine prohibitive costs); *Hardin v. Morningside of Jackson, L.L.C.*, 425 F. Supp. 2d 898, 900, 907–09 (W.D. Tenn. 2006) (applying *Morrison v. Circuit City Stores* in a four-step analysis which includes the "plaintiff's experience, background, and education"); *Phillips v. Assoc. Home Equity Services, Inc.*, 179 F. Supp. 2d 840, 846–47 (N.D. Ill. 2001) (accepting evidence from the plaintiff of filing costs for arbitration and the plaintiff's financial straits that would prohibit her from paying, ultimately ruling that the costs of arbitration were prohibitive); *accord James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020,

compares the costs of arbitration to costs of proceeding in litigation;<sup>220</sup> (3) the cost-benefit approach, which compares the costs of arbitration to the likelihood of plaintiff's potential recovery;<sup>221</sup> and (4) the incentive-based approach, which considers whether the plaintiffs or their potential attorneys have *any incentive* given the costs involved, to pursue their claims.<sup>222</sup> The source and relevance of each of these frameworks raises concerns about the

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1035 (S.D. Tex. 2012) (accepting the plaintiff's evidence that he had no current income, savings, nor could he afford to pay for the arbitration fees, thus making the cost-splitting provision prohibitively expensive); *Price v. Taylor*, 575 F. Supp. 2d 845, 854 (N.D. Ohio 2008) (emphasizing that a party seeking to invalidate an arbitration agreement for prohibitive costs based on unconscionability must prove the likelihood of incurring those costs with evidence of plaintiff's financial situation, and arbitration costs of similar cases).

220. *See, e.g.*, *James v. McDonald's Corp.*, 417 F.3d 672, 679–80 (7th Cir. 2005) (noting the Plaintiff needed to provide evidence of both her own financial situation, and the comparative expense of litigation versus arbitration costs); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 511 (6th Cir. 2004) (following the subjective approach from *Morrison v. Circuit City Stores* initially, but rounding out the analysis with a comparative approach, stating that a court must evaluate the likely cost of arbitration relative to the likely costs of litigation); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 n.5 (4th Cir. 2001) (“[A]n appropriate case-by-case inquiry must focus upon a claimant’s expected or actual arbitration costs and his ability to pay those costs, measured against a baseline of the claimant’s expected costs for litigation and his ability to pay those costs.”); *accord Phillips v. Assoc. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 846–47 (N.D. Ill. 2001) (noting that plaintiff’s arbitration would be twelve times the costs of filing in federal court).

221. *See, e.g.*, *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (concluding that *Kristian* is instructive in the proper comparison analysis, and including “the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery” as a relevant factor); *Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir. 2006) (holding that based on the plaintiff’s experts opinion, the expert fees in arbitration outweighed any potential damages plaintiffs would recover through individual arbitration); *Amex III* arguably employed a quasi-cost benefit approach when it compared the costs of proceeding in arbitration with each individual plaintiff’s prospective damages. 667 F.3d at 218 (concluding that it was not “economically feasible” for the plaintiffs to pursue their claims individually, given the high expert fees); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005) (noting that a case “sure to test this theory” is underway, referring to *In re American Express*).

222. For an example of a pure “incentive-based” approach see *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012), which held that under the fee-shifting and consumer friendly provisions of the arbitration agreement, the plaintiffs had an adequate forum for pursuing their claims, but recognized the concern that there were no incentives to do so. *See McKenzie v. Betts*, 55 So. 3d 615, 627–28 (Fla. Dist. Ct. App. 2011), *review granted*, 60 So. 3d 1055 (Fla. 2011) (concluding that the individual plaintiffs had a slim likelihood of a small recovery, thus the prohibitive costs prevented the plaintiffs from vindicating their statutory rights). *See also Concepcion*, 131 S. Ct. 1760–61 (Breyer, J., dissenting) (questioning “[w]hat rational lawyer would have signed on to represent the [plaintiffs] . . . for the possibility of fees stemming from a \$30.22 claim?”). The *Coneff* court concluded that such “incentive-based” policy arguments are foreclosed by *Concepcion*. The Court’s opinion in *American Express* removes any doubt.

desirability

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appropriateness of their use for determining whether any prospective litigant is actually deprived of vindication of statutory rights.

First, the subjective approach, which is exemplified by *Morrison* and its progeny, stands for the principle that a pre-dispute arbitration agreement may be rendered unenforceable based on the litigant's ability to pay for the arbitration.<sup>223</sup> *Morrison* took a divergent path, of course, by not just looking to the means of the actual litigant, but to all "similarly situated" litigants to determine whether arbitral costs would be a deterrent to their assertion of statutory claims.<sup>224</sup> But the most relevant inquiry, according to *Morrison*, was "the actual plaintiff's income and resources . . . to shoulder the costs of arbitration."<sup>225</sup> The importance of this factor is highlighted by the court's instruction to define the class of similarly situated potential litigants by "job description and socioeconomic background."<sup>226</sup>

At first blush, the subjective approach has merit. If a particular litigant, such as a low-wage worker, simply cannot afford the arbitral forum, then he or she should not be forced to litigate statutory claims in that forum. Further, this approach has some grounding in the scant guidance given by *Randolph*—footnote six did note that in attempting to prove her prohibitive costs argument, the plaintiff asserted that "[a]rbitration costs are high and that she did not have the resources to arbitrate."<sup>227</sup> Instead of rejecting the subjective approach as a valid cost-based argument, the Court concluded that Randolph's evidence as to what the costs of her arbitration would be were too speculative.<sup>228</sup>

Nonetheless, this approach makes little sense in terms of contractual expectations. As *Morrison* recognized, the effect of the subjective approach is to treat litigants differently based on income or socioeconomic background.<sup>229</sup> Although it may make some sense

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223. See *supra* note 219 and accompanying text.

224. *Morrison*, 317 F.3d at 663–64.

225. *Id.*

226. *Id.*

227. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 n.6 (2000).

228. *Id.*

229. *Morrison*, 317 F.3d at 683 (acknowledging that "this analysis will yield different results in different cases").

to treat “high-level managerial employees” (i.e., those with some level of sophistication) differently from low-level employees who have no discretionary income to fund arbitration of a statutory claim, it makes much less sense to do so in other contexts. For example, why should the affluent purchaser of a washing machine with a pre-dispute arbitration clause in the purchase agreement be subject to arbitration when the “low-wage” earner is not? After all, they both paid the same price for the same product. Or worse yet, should the enforceability of the arbitration agreement depend on whether the model is a luxury model or base model? From this, other questions arise: what is the proper measure of subjective ability to pay; wealth, income, or a hybrid? Is the wealthy retiree with little to no income less able to vindicate statutory rights than the first year law firm associate with a high starting salary, and an enormous debt-load?

Even in the employment context, in which one might suggest that wages earned bear some impact on the consideration given, the reasonableness of weighing the enforceability of the arbitration agreement against the claimant’s ability to pay is untenable. As the *Morrison* court recognized, any employee, after losing his or her job, will have a harder time funding dispute resolution than an employed person.<sup>230</sup> When this analogy is extended to the commercial world, the absurdities abound. Are only Fortune 100 companies susceptible to binding pre-dispute arbitration agreements? Certainly that result has already been rejected in cases like *Mitsubishi*, in which the automobile dealer was held to its pre-dispute contractual agreement with the monolith Mitsubishi Motors Corporation.

In sum, there is no reason that a wealthy or high-income litigant should be treated differently from a low-income litigant under a vindication of statutory rights analysis from a contractual point of view. Presumably, at the time of entering the arbitration agreement the parties were aware of their socioeconomic status and that their financial situation may change (which raises a new question: should the litigant’s ability to pay be measured at the time the agreement was signed, at the time the dispute arises, or at the point of filing a claim?). According to the language of *Mitsubishi*, the inquiry is focused on the *prospective* litigant’s ability to vindicate statutory

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230. *Morrison*, 317 F.3d at 669–70 (acknowledging that the choice to pursue arbitration is really a choice that boils down to risking scarce resources in the hopes of uncertain benefit).

claims.<sup>231</sup> So long as the parties, at the time of drafting the arbitration agreement, are not foreclosed of the opportunity to vindicate statutory rights by choosing the arbitral forum (and it is hard to see how they would be), the arbitration agreement should be upheld regardless of the parties' changed circumstances. Thus, like the unconscionability analysis, the court's focus under a vindication of statutory rights analysis should be guided by the *ex ante* position of the parties.<sup>232</sup> There may be an argument that high-wage, managerial type employees (of the sort mentioned in *Morrison*) are more sophisticated, and thus, capable of understanding the terms of their agreement—but that is an argument more properly addressed on state law unconscionability grounds, which typically takes into account the relative sophistication of the parties under the procedural fairness prong.<sup>233</sup>

The better framework, in as much as it is based on the text of *Randolph*,<sup>234</sup> is the comparative approach by which the costs of proceeding in the arbitral forum are compared with the costs of proceeding in litigation. As noted above, many courts have emphasized this framework, including *Bradford*. The *Bradford* court aptly explained: “[t]he cost of arbitration, as far as its deterrent effect, cannot be measured in a vacuum or premised upon a claimant’s abstract contention that arbitration costs are “too high.”<sup>235</sup> Rather, an appropriate case-by-case inquiry must focus on a claimant’s expected or actual arbitration costs measured against a baseline of the claimant’s expected costs for litigation. As previously discussed, *Randolph* did not elaborate on the proper factors a court should consider under a “prohibitive costs” analysis. But the Court

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231. See *supra* note 52 and accompanying text.

232. See generally, 8 WILLISTON ON CONTRACTS, § 18:10 (4th ed.); U.C.C. § 2-302 official cmt. See also, RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt c. (“The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.”); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 267 (2006) (“It is clear that proper application of the unconscionability doctrine involves an assessment of the contract *ex ante*, rather than *ex post*.”).

233. *Id.*

234. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 n.6 (2000).

235. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001). See also Ware, *supra* note 232 at 286–87 (arguing that a “costs-based challenge to an arbitration agreement . . . should fail unless the total cost the plaintiff faces in arbitration significantly exceeds the total cost the plaintiff would face in litigation”).



did note Randolph's showing of estimated arbitration costs in footnote six.<sup>236</sup> It was these estimates, based on the arbitration agreement's silence as to forum and fees, that were too speculative for the plaintiff to carry her burden. But the Court did not say analysis of arbitration costs in some manner is inappropriate—thus, courts are left with two options: comparing arbitration costs to the claimant's ability to pay (the subjective approach) or comparing arbitration costs to the litigation forum (the comparative approach).

By tracing the roots of the “prohibitive costs” doctrine back to *Mitsubishi*, it becomes even more likely that the Court intended any cost-based defense to be based on a comparison of the costs of arbitration to the judicial forum. *Mitsubishi's* preservation of a defense based on the prospective litigant's ability to vindicate its statutory rights focused on the availability of vindication in the arbitral, as opposed to the judicial forum.<sup>237</sup> Further, the Court left open the possibility that a party could contest the enforcement of dispute resolution in arbitration on the basis that it would “be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.”<sup>238</sup> *Gilmer* confirms the hypothesis that the comparative framework is appropriate. Instead of focusing on the financial inequities between the *Gilmer* plaintiff and his employer, the Court held that the employee must arbitrate his ADEA claim.<sup>239</sup> Finally, during the oral argument of *American Express*, Justice Scalia confirmed that in his view, at least, the comparison of costs must be costs in arbitration as compared to those present in litigation.<sup>240</sup>

Further, use of the comparative costs approach would strike the

236. *Id.*

237. *Mitsubishi*, 473 U.S. at 637. This is true even if the Court continues to limit *Mitsubishi* to the *right to pursue* statutory remedies as it was limited in dicta in *American Express*. See *supra* notes 207–10 and accompanying text.

238. *Mitsubishi*, 473 U.S. at 632–33 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1967)).

239. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Indeed, the Court did not even mention the plaintiff's financial status as relevant, even though *Gilmer* did argue that the “unequal bargaining power” between he and his employer should be a basis for refusing to enforce the agreement. *Id.* at 32–33.

240. Transcript of Oral Argument at 32–33, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012) (Scalia, J., to Appellant Q: “Let me ask you. Your effective vindication principle depends upon a comparison with what you could do in Court. . . . You have to compare it to court. If you couldn't do it in court, you don't have to be able to do it in arbitration, it seems to me.”). Justice Scalia, writing for the majority, did not engage in this analysis in *American Express*.

appropriate balance between the purpose of the FAA, which is to put arbitration agreements on equal footing with other contracts, and adequately ensuring that the prospective litigant has not waived effective vindication of statutory rights. For example, if due to fee-splitting provisions the arbitrator's fee, filing fee, administrative costs, and other true "arbitral costs" made arbitration five times more expensive to arbitrate a discrimination claim than a litigant would face in court, it is no far stretch to say that arbitration is prohibitively expensive, and is *not* the kind of equally adequate substitute forum for a judicial forum that *Mitsubishi* envisioned. This should be true even if the prospective litigant is Warren Buffet and can truly afford the arbitration, regardless of the costs. Of course, this premise fits neatly within the original purpose of arbitration: "to keep the effort and expense required to resolve a dispute within manageable bounds."<sup>241</sup> Indeed, given the rising costs of arbitration proceedings today in commercial disputes, it would be advantageous to all post-dispute litigants to determine whether they truly are better off in arbitration than the courts (considering all factors, including what should be streamlined discovery and proceedings, reduced motions practice, and the use of arbitrators with expertise to alleviate the costs of experts).

Another attractive reason for courts to employ the comparative approach is that it is relatively simple. Courts are well-attuned to the costs of proceeding in the judicial forum (filing fees, jury fees, costs of discovery, etc.). Thus, the prohibitive costs question should focus on: (1) how much will this arbitration cost (i.e., what are the non-litigation based fees and costs involved); and (2) what is the differential between arbitration and litigation? Indeed, had the Second Circuit applied this framework to the *Amex* line of cases in 2009, when the plaintiffs first contested individual arbitration based on the excessive costs of their proposed expert fees,<sup>242</sup> the resolution would have been relatively straightforward. The *Amex*

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241. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). As the *Mitsubishi* Court noted, "adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Id.*

242. Of course, one must note that having the proposed expert for the analysis also opine as to the necessary fees involved is a bit like putting the child in the candy shop—the expert has every incentive to shoot the moon and inflate the fees that he or she will likely ultimately be paid if the case goes forward.

plaintiffs did not contend, and would have conceded, that the expert fees would be less in pursuing individual litigation as opposed to arbitration. The crux of their argument was that at least in litigation, they could proceed as a class and share the costs. But the fact is that it is not *arbitration* as compared to *litigation* that was prohibitively expensive—as expert analysis would have been necessary in both—but rather, it was proceeding individually as opposed to a collective action.<sup>243</sup> Given the antitrust dispute at issue and the parties' freedom in selecting the arbitrator, one would think they would select an arbitrator well-versed enough in market analyses to cut through some of the necessity of the costly expert testimony. In other words, the parties should hire an expert in antitrust as arbitrator to simplify and narrow the issues in the case.<sup>244</sup>

The response to this argument is that given the modest amount of damages involved, no individual litigant will bring the case. While I dispute that idea in *American Express*, in which some litigants stood to gain as much as \$38,000 and the median damages were \$1,751–\$5,252, the theory may be viable in other truly low value claims, such as claims for \$30. This raises the two remaining frameworks courts have used to assess a prohibitive costs defense—the cost-benefit approach and the incentive approach.

Under the cost-benefit approach, a court tasked with determining whether a litigant should be bound by a pre-dispute arbitration agreement would compare the likely costs of proceeding in arbitration (again, this should be true arbitral costs, not costs necessarily bound up in litigation) as compared to the potential

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243. But there are other ways the plaintiffs could have availed themselves of cost-sharing mechanisms. First, it is not clear at all that American Express's "confidentiality provision" would have prevented the plaintiffs from hiring an expert to do the same market analysis, and different damages calculations for each. Indeed, *American Express* conceded that the confidentiality provision would not prevent some sharing of expert theory between plaintiffs, and later agreed plaintiffs could completely share the costs of the expert. Transcript of Oral Argument at 4, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012) (Attorney for Petitioners, admitting that "we have conceded below that the parties could share the costs of that expert just as they could share the costs of a lawyer."). Further, as Chief Justice Roberts reminded the litigants, nothing would have prevented a trade association made up of the litigants (or a hedge fund funding the litigation) from funding the base research and analysis of the expert report, which could then have been used by each litigant in each individual arbitration. *Id.* at 20–21.

244. The parties may still have to present individual expert opinions on individual issues, such as damages, but as to central issues—one would think a leading expert in the field would need little more input from the parties' competing expert opinions.

likelihood of recovery. As this analysis has been employed in the past, particularly with respect to the class-action waiver, if the costs of proceeding in arbitration were higher than the potential likely recovery, then the arbitration clause may be invalidated on the grounds that no rational litigant would vindicate that claim. On its face, the problems inherent in such an analysis abound. First, each decision about whether to resolve a dispute necessarily involves some cost-benefit analysis, whether in court or in an alternative forum. Even in court, pursuing claims is far from free, and the litigant must question, are my potential damages sufficient, coupled with my risk of losing, to justify the costs, the time, the stress and potential emotional drain? The decision to arbitrate is no different. Now, as argued above, if the decision to arbitrate leads to much higher costs than litigation, it may be that the arbitration agreement is acting as an unenforceable waiver of statutory rights. But simply requiring the litigant to make a decision about whether a claim is worthy of time, money, and effort is asking no more of the arbitral litigant than the judicial.

Further still, the focal point of the parties' agreement should be *ex ante*—at the time they entered into the arbitration agreement, not after a dispute has arisen and damages may be great or they may be *de minimis*. It could very well be that parties would inherently waive their access to courts (which certainly is not free), or governance by the discovery procedures required by the Federal Rules of Civil Procedure, and hence, inherently agree that “small value claims” are not worth very much of their time, in exchange for the ease of bringing more lucrative claims in a more efficient forum.<sup>245</sup> By shifting the focus to the damages likely to be recovered by a claim that arises after the parties have agreed to arbitrate, the court improperly shifts the position or intent of the parties from *ex ante* to *ex post*. In sum, if it were true that merely having a claim that is not sufficiently lucrative to justify the expense of arbitration were enough to launch a defense based on the effective vindication of statutory rights, then the court system would equally fail, because no one in their right mind would assert a claim for \$30 in court, if the filing fee was \$30 or more. Indeed, in many arbitration agreements that have surfaced in recent years, the litigant with presumed unequal bargaining power (a consumer, for example), is actually

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245. See Lampley, *supra* note 14, at 512–17.

better off in arbitration, fully funded by his opponent, and with the possibility of a windfall if an appropriate settlement is not reached, than in court.

The incentive-based framework suffers from the same infirmities as does the cost-benefit framework. It may be that the parties were quite willing, at the time of the agreement, to forego any incentive to assert low-value claims. And, in low-value claims, there will also be a question of whether there is any incentive for litigants to pursue those claims. But the incentive-based approach has deeper problems, because it is a policy-based reason to invalidate an otherwise valid contractual agreement. Recall that under an incentive-based framework, the assumption is that the plaintiff can be made whole in arbitration, but lacks any incentive to pursue the claim and therefore is not capable of vindicating statutory rights. But by creating statutory rights, such as antitrust claims, anti-discrimination claims, and predatory lending claims, Congress did not simultaneously demand that every litigant always enforce those rights. Indeed, the *Mitsubishi* Court recognized in the context of a Sherman Act claim that the “cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, and the private antitrust plaintiff needs no executive or judicial approval before settling one.”<sup>246</sup> And because the class waiver does not interfere with the right to pursue federal claims in arbitration (or litigation, for that matter), the Court rejected the incentive-based approach in *American Express*.<sup>247</sup>

Thus, in the same way that a litigant may choose to settle a particularly complex, expensive, or risky statutory claim for cents on the dollar, a prospective contractual party may accept forgoing one set of incentives (the incentive to pursue low-value claims as a member of a class) for another (the incentive to arbitrate, potentially at a lower premium than litigation, more meritorious claims in exchange for a higher rate of recovery). Because the cost-benefit approach and the incentive approach have no proper place in the Court’s “vindication of statutory rights” jurisprudence or contractual theory, they should not be employed by courts as frameworks under which to invalidate pre-dispute arbitration agreements.

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246. *Mitsubishi*, 473 U.S. at 636.

247. See *supra* note 218 and accompanying text.

## VII. CONCLUSION

Since *Randolph*, courts have struggled with how to evaluate prohibitive costs as a defense to arbitration under the “vindication of statutory rights” defense. Courts, depending on the context of the dispute, have employed four different frameworks, or a hybrid of each: (1) the subjective approach, which compares the costs of arbitration to the litigant’s ability to pay; (2) the comparative approach, which compares the costs of arbitration to the costs of proceeding in litigation; (3) the cost-benefit approach, which compares the costs of arbitration to the likelihood of plaintiff’s potential recovery; and (4) the incentive-based approach, which considers whether the plaintiffs or their potential attorneys have any incentive given the costs involved, to pursue their claims. An analysis of the genesis of the “vindication of statutory rights defense” and the purposes it serves, that of the FAA and federal comity, reveals that the only framework that courts should employ to render an arbitration agreement unenforceable due to prohibitive costs is one that contrasts true arbitration costs from those that would be incurred in the judicial forum. Although the Supreme Court inherently rejected the incentive-based approach in *American Express*, it offered no guidance to lower courts as to what costs should be considered in analyzing a cost-based defense, other than to question the bases of the cost-based defense. Despite the Court’s questionable narrowing of *Mitsubishi*’s “effective vindication” doctrine, a viable defense based on truly prohibitive costs should still exist, as the Court has never overruled *Mitsubishi*, *Randolph*, or any of the cases recognizing arbitration as an alternative forum for vindicating such rights. But the proper framework for analyzing such a defense is whether the costs of the arbitral forum as opposed to the judicial forum (i.e. costs only incurred in arbitration) pose a prohibitive barrier to pursuing those federal statutory claims.